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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

LEA MÁRQUEZ PETERSON – Chair
SANDRA D. KENNEDY
JUSTIN OLSON
ANNA TOVAR
JIM O'CONNOR

INVESTIGATION OF THE FRONTIER COMPANIES ("FRONTIER") IN ARIZONA REGARDING 9-1-1 OUTAGES AND THE ADEQUACY OF FRONTIER EQUIPMENT AND FACILITIES	**DOCKET NOS. T-03214A-21-0198** **T-02115A-21-0198** **T-01954B-21-0198** **T-20680A-21-0198** **APPLICATION FOR REHEARING OF DECISION NO. 78718 (ORDER AMENDING DECISION NO. 78645)**

Citizens Telecommunications Company of the White Mountains, Inc. d/b/a Frontier Communications of the White Mountains, Citizens Utilities Rural Company, Inc., Frontier Communications of the Southwest Inc., and Navajo Communications Company, Inc. (collectively, "Frontier") hereby apply, pursuant to A.R.S. § 40-253 and A.A.C. R14-3-111, for rehearing of Decision No. 78718, issued by the Arizona Corporation Commission (the "Commission") on September 20, 2022 (the "Amended Order").

The Amended Order modifies Decision No. 78645, issued by the Commission on July 27, 2022 (the "Original Order"), by removing a requirement that Frontier disseminate its Emergency Response Plan to public safety agencies and the State 911 Office. The Amended Order provides that "all other aspects" of the Original Order "shall remain in effect." Frontier supports the amendment set forth in the Amended Order, but maintains the objections to the Original Order expressed in Frontier's Application for Rehearing of Decision No. 78645, dated August 16, 2022 (the "August 16 Application"). Accordingly, Frontier hereby submits this Application for Rehearing of the Amended Order solely to preserve its procedural rights, modifying its August 16 Application only to remove its prior objection to the Emergency Response Plan dissemination requirement, which the Amended Order

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has resolved. A redline comparison reflecting the changes between the August 16 Application and this Application is attached as Exhibit A hereto.

The Original Order, as modified by the Amended Order (together, the "Order"), should be set aside for two independent reasons.

- First, the Commission issued the Order without affording Frontier due process of law or abiding by governing administrative procedural requirements under Arizona law.
- Second, the Order is unlawful, unreasonable, and unsupported by substantial evidence.

The Order also will have several adverse practical impacts that are not in the public interest. For all of these reasons, Frontier respectfully requests that the Commission vacate the Order in its entirety so that Frontier can work with the Commission and its Utilities Division Staff ("Staff") to develop a remedy plan that will accomplish, rather than undermine, the Commission's legitimate goal of ensuring safe and reliable 911 access for the people of Arizona.

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I. PRELIMINARY STATEMENT

Frontier understands the importance of reliable access to emergency services through 911 for Arizona residents. And Frontier shares the Commission's concerns about the tragic ramifications for the communities of Apache and Navajo counties resulting from the felonious act that was perpetrated against Frontier's network on June 11, 2022. Before that senseless act of vandalism, Frontier had been working closely with Staff to develop and implement an 11-step plan to help protect against future outages (the "Interim Remedy Plan"). The Commission approved the Interim Remedy Plan on March 2, 2022, at which time the Commission acknowledged that Frontier was "making a concerted effort to rectify this situation." (Decision No. 78495 at 16:19.) Since that time, Frontier has filed three compliance filings on this docket in response to the March 2 order detailing the improvements Frontier has been making to its network, along with its efforts to evaluate further measures that can be taken.[1] The only thing that changed between the Commission's approval of the Interim Remedy Plan and its issuance of the Order was that a scofflaw deliberately fired a weapon at Frontier's fiber optic cable in multiple locations—an attack which outraged Frontier as much as it did local residents.

Frontier's efforts to protect against future outages continued following the attack on its network. When an unidentified individual fired a shotgun into Frontier's fiber optic cable, Frontier's landline customers' ability to reach 911 was disrupted for approximately one hour, when Frontier was fixing the cable. Wireless service provided by other carriers such as Verizon ("Wireless Carriers"), who contract with Frontier for Ethernet data services, suffered a longer outage of approximately two days. This failure of the wireless service had a number of tragic consequences that were the subject of the Commission's open meetings in June and July and a town hall held in St. Johns, Arizona. In the meantime, Frontier has continued to collaborate with Staff in implementing the 11-step Interim Remedy Plan, and did not object to the final remedy plan (the "Remedy Plan") that Staff presented for the Commission's approval at the July 12-13 opening meeting. (Dkt. No. E000020073.)

This time, however, instead of endorsing this constructive process, the Commission adopted a series of coercive amendments to the Remedy Plan that—if allowed to stand—will have harmful consequences for Arizona and its residents. Chief among them is that, according to the analysis of the Commission's own professional Staff, the Order's compelled investment in "redundancy" and

[1] The compliance filings in question can be located on the docket at Nos. E000018573 (Apr. 1, 2022), E000018986 (Apr. 27, 2022), and E000019278 (May 16, 2022).

"diversity" likely would result in a surcharge of $78 per month. (7/13/22 Tr. at 138:13-18.)[2] That surcharge alone is more than ***three times*** the average customer's monthly telephone service bill in the affected area.[3] Frontier has no market power to require such increased charges, particularly given the wide array of wireless services and other communications technologies available to consumers in today's market. Frontier's customers would likely drop their service in droves in the face of a ***quadrupling*** of their monthly tab, even if they did not want to do so. As one Commissioner noted at an open meeting, "We've got to keep you guys in business because if you are not in business then there's not only no redundancy, there's no phone service at all." (7/13/22 Tr. at 158:17-20.) If the Order is allowed to stand, either Frontier White Mountains will be driven out of business, or customers will cancel their service. Either way, there will be "no phone service at all."

To the extent the Order requires Frontier to pursue state or federal funding to finance the project, that protection is illusory because the Order requires Frontier to self-fund the investment within 180 days of the Order (*i.e.*, in December 2022), whereas the governmental funding programs referenced in the Order are on fundamentally different timetables. Awards for the NTIA's Enabling Middle Mile Broadband Infrastructure Program will not be identified until March 2023—two months after the Order's deadline for Frontier to begin self-funding. Awards for the NTIA Broadband Equity, Access, and Deployment Program are expected to be announced beginning in the fourth quarter of 2023—some as much as a year or more after the self-funding deadline. Because the self-funding would need to commence before such grants are announced, the Order could preclude the use of such grant money, resulting in higher costs for consumers. Other features of the Order are also ill-advised, such as:

- *Mandating a specific point of interconnection chosen by Comtech, Arizona's new 911 service provider (Section I)*. This mandate prematurely rules out the possibility of lower costs solutions, requiring Frontier (and potentially other carriers) to incur significant monthly costs indefinitely, which likely will result in higher costs for consumers.

[2] Frontier has ordered transcripts of the archived videos of the open meetings referenced in this Application from a certified court reporter and will arrange for the transcripts to be filed in this docket.

[3] For example, for Frontier White Mountains' customers, the basic residential standalone service charge is $25.10, before taxes and other charges, and is comprised of: Single Party Residence Service charge ($15.60), Primary Federal Subscriber Line Charge ($6.50), Access Recovery Charge ($2.50), and Touch Call Service fee ($0.50).

- *Requiring premature budgetary and customer impact analyses (Section VIII).* This requirement goes into effect within 90 days, when uncertainty will remain concerning several key factors, including the award of grant money and cooperation from other carriers, likely resulting in a materially inaccurate and unhelpful submission.

In any event, setting aside these key practical concerns, the Order is unlawful and should be vacated on both procedural and substantive grounds. To summarize:

Procedural Flaws. The Order was issued without affording Frontier due process of law or abiding by the administrative procedural requirements governing the Commission under Arizona statutes. The Commission provided Frontier with no notice or meaningful opportunity to be heard, whether in the form of testimony or other evidence, objections to the proposed amendments with advance notice of their substance, exceptions to proposed findings of fact, or other features of a contested case under Arizona law. Instead, the Commission simply adopted at an open meeting a series of amendments to Staff's proposed Remedy Plan. The Commission did not hold an evidentiary hearing or otherwise generate any semblance of an evidentiary record, relying on the unsworn statements of local officials and third-hand stories of disgruntled customers (most if not all of whom appear to have been wireless customers, not Frontier customers). The Order that resulted from this flawed process failed to identify any applicable legal obligations or violations thereof, whether in respect of maintenance of a 911 system or the redundancy and diversity mandates reflected in the Order.

Substantive Flaws. The Order on its face is unlawful, unreasonable, and unsupported by ***any*** competent evidence, much less the "substantial evidence" required by Arizona law. *See, e.g.*, *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 496 P.3d 421, 425 (Ariz. 2021). Among other things, the Order's directive that Frontier undertake capital investments estimated at $40 million in the Frontier White Mountains service area alone, with no assurance of any return on the investment (much less the reasonable rate assured by the Arizona Constitution), is an uncompensated taking, in violation of the U.S. and Arizona Constitutions. It is no solution that the Commission intends to allocate costs to "non-Commission jurisdictional" customers in a future rate case, as the Commission has no ability to compel those customers to pay additional costs, effectively requiring Frontier to absorb them. This forced,

unrecoverable investment is palpably unfair in light of Staff's repeated observation that Frontier "did not do anything wrong" in connection with its response to the shotgun blast. (7/12/22 Tr. at 44:22-23.)

The Commission's decision to single out Frontier (but not other similarly situated telecom providers) with respect to the Order's redundancy/diversity mandate is likewise unconstitutional, a plain contravention of equal protection principles. And the Order suffers from additional flaws—colliding with the authority of the Federal Communications Commission ("FCC"), unlawfully interfering with Frontier's management, and imposing various disclosure mandates that exceed the scope of the Commission's authority.

In light of the foregoing, the Commission should grant this Application for rehearing and vacate the Order so that Frontier can work with Staff to develop a remedy plan that addresses the Commission's concerns while also attending to the complicated technical and economic feasibility issues presented. In the absence of such relief, Frontier will be forced to seek *de novo* review in superior court, or a Special Action in the Arizona Supreme Court, likely resulting in the very same remand but with unnecessary delay—a result that disserves the interests of the Commission and the Arizona citizens it seeks to protect. *See* A.R.S. § 12-910(F) (Arizona courts reviewing final Commission decisions "shall decide all questions of law [and] . . . all questions of fact without deference to any previous determination that may have been made . . . by the agency").

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Competitive Landscape of Frontier's Telecom Service in Arizona.

Frontier operates in Arizona in a highly competitive landscape for telecom services. Although Frontier is the incumbent provider of landline phone service in the areas in which it operates, including the northeast region of Arizona where the vandalism against Frontier's network occurred, Frontier faces competition from a variety of alternative communication technologies, most notably wireless services. Contrary to Commissioner O'Connor's description of Frontier as a "monopoly compan[y] . . . where you do get the benefit of passing through 100 percent of the cost for what we order you to do, and a profit or return on those costs" (7/13/22 Tr. at 158:13-17), Frontier does not wield anything close to monopoly power. Wireless access is close to ubiquitous in Arizona, such that Frontier's landline customers can, and often do, simply discontinue Frontier service and opt to rely exclusively on wireless

services and other alternatives provided by other carriers. This technological and competitive dynamic has resulted in a continuous decline in Frontier White Mountains' customer base for over a decade, from approximately 40,000 landline customers in 2005 to about 10,000 today—an exceedingly small ratepayer base to finance the kind of investment required by the Order. As discussed below, further decline in this small ratepayer base is certain to continue if the costs of landline service increase.

B. Staff Commences Inquiry Into Frontier Service Disruptions Affecting 911 Service, and Frontier Voluntarily Cooperates.

Over a year ago, in July 2021, Staff commenced an investigation at the direction of the Commission relating to telecom service disruptions that had occurred in areas of Arizona served by Frontier, in some cases resulting in citizens' temporary inability to access 911 services. In coordination with Staff, Frontier conducted a detailed root-cause analysis of recent outages. Generally, the service disruptions giving rise to the inquiry resulted from underlying power outages, raising questions as to whether Frontier and other telecom companies operating in Arizona, such as CenturyLink, had sufficient back-up batteries to support uninterrupted service when the power went out. As detailed in Frontier's compliance reports, Frontier has been fully cooperating with Staff's investigation from the outset and has been working diligently to improve service. Frontier has not only investigated how certain power outages frustrated landline customers' ability to complete 911 calls, but also has developed and taken substantial steps to address these outages and other reliability concerns expressed by Staff, expending significant funds to continue to improve its network reliability.

After Staff's nearly nine-month investigation, on March 2, 2022, the Commission approved Staff's 11-step Interim Remedy Plan. (Decision No. 78495.) The Interim Remedy Plan was the product of Frontier's ongoing cooperation with Staff. In addition to various periodic reporting requirements, the Commission required Frontier to "make its best efforts to, within 30 days, make improvements necessary to prevent excessive future outages." (*Id*. at 20:18-22.) If the improvements had not been made within 30 days, the Commission reserved the right to "commence an Order to Show Cause hearing why they have not been made and to consider appropriate penalties." (*Id*. at 20:24-28.) Thirty days later, on April 1, Frontier filed a report updating the Commission on its progress, and then filed supplemental updates on April 27 and again on May 16. Staff never determined that Frontier had failed to meet its obligations under the March 2022 Order, and thus the Commission never commenced an

Order to Show Cause hearing. Indeed, the Commission noted that Frontier was "making a concerted effort to rectify this situation; albeit its efforts are in the early stages." (*Id.* at 16:19-20.)

C. Shotgun Attack Damages Frontier White Mountains' Network, Disrupting Wireless Services and Impeding 911 Access.

On June 11, 2022, an unknown individual vandalized Frontier White Mountains' network in a sparsely populated area. The criminal used a shotgun to damage a fiber optic cable in multiple locations spanning a three-mile area. The vandalism did not harm the fiber strands responsible for landline service, leaving such service largely unaffected for Frontier's customers. However, in order to engage in the splicing work necessary to repair the fiber strands that were damaged, Frontier was required to take the landline strands offline for a short interlude. In advance of doing so, Frontier coordinated matters with the four public safety answering points that would be affected, proactively re-routed any calls that would be placed to 911, and successfully tested the re-routing. Certain technical glitches briefly impeded that re-routing, preventing Frontier's landline customers from completing 911 calls for approximately one hour.

In contrast, fibers used for providing data services to Verizon (the main Wireless Carrier in the area) were significantly damaged, preventing residents from placing calls using their cell phones, including to 911, for a period of approximately two days. The services provided by Wireless Carriers are distinct from the regulated telephone services provided by Frontier. Wireless Carriers purchase data services from Frontier in order to provide wireless services to their customers. Those data services are not regulated by the Commission. In contracting with Frontier, Wireless Carriers have a choice as to whether to contract and pay for specific redundant routes, whether by leasing redundant circuits from Frontier, or by contracting for redundant routes with other providers. Wireless Carriers also have the option to build their own facilities to serve and provide redundant and diverse routes to serve their customers. No Wireless Carrier has contracted with Frontier for redundancy in the impacted area, and Frontier has no visibility into whether any have contracted for additional circuits with third parties or self-provisioned their own redundant network, which they have the option to do. As a mere contractual counterparty, Frontier has no practical ability, much less a regulatory obligation, to compel Wireless Carriers to choose redundancy in negotiating for the use of Frontier's network or otherwise. And even if Frontier had redundancy for the area impacted by the damaged fiber, there is no assurance Wireless

Carriers would purchase redundancy from Frontier. The existence of redundant facilities does not automatically provide redundant services.

According to oral and written statements by St. Johns Police Chief Lance Spivey, during the service disruption caused by the attack, an elderly resident of St. Johns needed medical assistance and a caretaker was unable to reach emergency services through 911 for some time. Although an ambulance was eventually located, the resident tragically passed away while being transported to the hospital. During the same time period, a young child in the same region seriously injured herself at home. The child's mother was forced to transport the child to a hospital to seek medical care in lieu of an ambulance due to the apparent unavailability of 911. Chief Spivey recounted two other stories involving a teenager with a broken leg and a child with rheumatic fever, but both had successful outcomes. Chief Spivey did not identify any of these individuals as Frontier customers (whose services were impacted for only one hour), as opposed to wireless customers (whose services were more significantly impacted). Frontier grieves for these families' losses and experiences, and has offered a $10,000 reward for information leading to the apprehension of the person(s) responsible. However, more than two months after the attack on Frontier's network facilities, local law enforcement has yet to identify and apprehend the perpetrator.

D. The Commission Addresses the June 11 Attack and Resulting Service Disruption at the June 28, 2022 Open Meeting.

In the wake of the service disruption and associated 911 issues, and the media coverage that ensued, the Commission discussed the matter at the June 28, 2022 open meeting (the "June Open Meeting"). Chairwoman Márquez Peterson opened the meeting by referring to "the 9-1-1 service failure by Frontier," before any commentary was introduced on what had occurred or whose services had been affected by the attack. (6/28/22 Tr. at 4:7.) Certain local officials from St. Johns—Chief Spivey, Mayor Spence Udall, and Assistant Fire Chief Jason Kirk—recounted stories they had heard of 911 disruption following the June 11 attack, but the Commission did not attempt to determine whether the service disruption the individuals experienced was in connection with services these end users purchased from Frontier or from Wireless Carriers. Indeed, the comments from Messrs. Spivey, Udall, and Kirk each proceeded from the erroneous premise that Frontier was responsible for keeping Verizon's wireless network fully functioning. (*See* 6/28/22 Tr. at 97:20-24 (Chief Spivey: "You heard

them talk that Verizon, we're not – they provide the data that provides the feed to the tower. So if they go down, it affects Verizon. And 95 percent of the people in St. Johns probably use Verizon cell phones."); *id.* at 54:2-10 (Mr. Kirk: "[T]here is some truth in Frontier's statement that the 9-1-1 system was only down for approximately 90 minutes on Sunday. The unfortunate part of that is that the play on words that's not addressed is the fact that the backbone of every Verizon cell tower, most of the infrastructure, including gas pumps, as Chief Spivey said, grocery stores and other facilities was rendered useless because of the unavailability of the fiber connection.").) Although representatives of Frontier attended the meeting, answered the Commissioners' questions, and attempted to respond to the stories recounted by local officials, the open meeting was not, and did not purport to be, an evidentiary hearing. No testimony was taken under oath, and no evidentiary record was created.

At the close of the June Open Meeting, the Commission directed Staff to prepare a remedy plan to address certain concerns identified by the Commission relating to service disruption issues. The Commission did not direct Staff to prepare a complaint and Order to Show Cause, which would have required the Commission to bear the burden of proof on the matters at issue and to give Frontier 20 days' notice. The Remedy Plan was docketed on July 11, 2022. One day later, a proposed order incorporating the Remedy Plan was filed.

The Commission also directed Staff to conduct a town hall session in St. Johns. The Commission required Frontier to send senior executives to the town hall. Staff convened the town hall on July 7, 2022. Four Frontier representatives, three Commissioners, members of Commission Staff, and various members of the public attended. Although the Commissioners in attendance heard public comment, the July 7 town hall was not, and did not purport to be, an evidentiary hearing. No testimony was taken under oath, and no evidentiary record was created. According to Commissioner Tovar, the "vast majority" of the community members who spoke at the town hall were wireless customers. (7/12/22 Tr. at 61:15-17.) The Frontier representatives in attendance were not allowed to respond to community questions during the town hall nor to ask clarifying questions regarding the concerns expressed. However, the Frontier representatives remained after the town hall ended and voluntarily answered questions from the community.

E. The Commission Adopts Certain Amendments to the Remedy Plan, With No Notice to Frontier, at the July 12-13, 2022 Open Meeting.

On July 12 and 13, 2022, the Commission held another open meeting (the "July Open Meeting"). The agenda included the investigation into Frontier's service disruption issues. When the meeting commenced at 9:00 a.m., the only document before the Commission relating to these matters was Staff's Remedy Plan and proposed order that had been solicited by the Commission at the June Open Meeting.

On the first day of the open meeting (at 1:28 p.m., well after the open meeting had commenced), without advance notice to Frontier, Chairwoman Márquez Peterson docketed an amendment to the Remedy Plan to convert it into a "Remedy Order" ("Amendment 1"). Subsequent to Amendment 1, on July 12 and 13, Chairwoman Márquez Peterson and Commissioner Kennedy docketed other proposed amendments to the Staff's Remedy Plan.

Chairwoman Márquez Peterson's second proposed amendment was expressly intended (as noted on the amendment) to adopt substantial portions of amendments proposed by Chief Spivey in a letter docketed on the morning of July 12 ("Amendment 2"). Amendment 2 was not based on any semblance of an evidentiary record; rather, as the amendment expressly stated, it was intended to simply adopt the recommendations set forth in Chief Spivey's public comment letter. Chief Spivey's oral and written comments did not indicate any technical background on his part in telecommunications engineering or networks.[4]

At the core of Chief Spivey's comments was the assertion that Frontier should be required, at its own expense, to ensure redundancy and diversity for all telecommunications customers. As Chief Spivey stated on the first day of the July Open Meeting: "[Frontier] should be required to use their company profits. . . . I don't even see why this is a discussion point right now." (7/12/22 Tr. at 39-40:25-2.) Chairwoman Márquez-Peterson noted in response that "we don't have jurisdiction on shareholder dollars or company money as you've described it." (*Id.* at 40:5-7.) Staff agreed with the Chairwoman's observation. (7/13/22 Tr. at 139:15-20 ("I know there is numbers thrown out about how

[4] Despite adopting in the Order nearly all of Chief Spivey's suggested amendments, the Commission did not adopt Chief Spivey's recommendation that the Commission issue an Order to Show Cause.

they are a multi-billion dollar company. . . . But I believe . . . the jurisdiction for intrastate belongs to the Commission. When it comes to interstate, it belongs to the FCC.").)

In response to Commissioner Kennedy's proposed amendment directing Staff to examine whether an interim manager could or should be appointed at Frontier, Staff noted that the Commission would need to proceed by way of an Order to Show Cause, and that Staff would "have the burden of proof to show that the company did something wrong." (7/12/22 at 44:13-14.) Staff expressed the view that "what happened on June 11 . . . is not the company's fault," and "the company . . . did not do anything wrong." (*Id.* at 44:19-23.) Staff stated further: "I hope the Commission will not direct us to do an [interim manager] because . . . I would have to show that it did something wrong." (*Id.* at 82:13-16.) Staff also noted that, to pursue an interim manager, "you have to go through all this proceeding," and "[i]t's going to take a long time." (*Id.* at 93:22-24.) Nonetheless, Commissioner Kennedy captured the mood on the Commission by brushing aside Staff's due process concerns: "There has to be a remedy ***and we have to do something today***." (*Id.* at 51:1-3 (emphasis added).)

Although the Commission took public comment during the Frontier portion of the agenda, and although Frontier's representatives responded to the Commissioners' questions, Frontier had limited opportunity to comment on the amendments, and in any event had no notice of the amendments or their contents prior to their filing after the July Open Meeting had commenced. The July Open Meeting was not, and did not purport to be, an evidentiary hearing. No testimony was taken under oath, and no evidentiary record was created, regarding Staff's proposed Remedy Plan or the amendments that had been unexpectedly docketed by the Commissioners.

In the course of the July Open Meeting, certain Commissioners noted the constitutional impediments to the kind of confiscatory measures that were under contemplation. For instance, Commissioner Olson stated:

> Certainly understand Chief Spivey's desire to . . . have the company fund it with their property. Like the Chairwoman mentioned, that's not something that's within our constitutional authority to require the company to spend their resources without having the entitlement to recover those expenses with the return on their investment. (*Id.* at 41:6-12.)

Later, Commissioner Olson underscored his concerns:

> My concern is that it's not our prerogative to take their property. . . . [T]he company has constitutional private property rights, and if we do not allow recovery and issue a ruling that is confiscatory, then the company can challenge that in the courts, and they will be entitled to obtain both the return of their investment and the return on it. It is their constitutional right. (*Id.* at 103-04:20-3.)

Commissioner O'Connor agreed: "[W]e have to respect, as the constitution demands of us, that . . . [public utility companies] get the benefit of passing through 100 percent of the cost for what we order you to do, and a profit or return on those costs." (7/13/22 Tr. at 158:12-17.)

As for Staff's views on the costs of ensuring redundancy and diversity, Staff stated: "I don't believe the full [responsibility for] redundancy and diversity belongs to Frontier." (*Id.* at 141:11-14.) Regarding Frontier's leasing of its fiber strands to Wireless Carriers, Staff stated that responsibility for redundancy and diversity is determined by the lease agreement. (*Id*. at 143:17-21 ("I believe Frontier's responsibility is to fulfill the obligation based on the contract, and if Verizon wanted redundancy, they could ask as part of the contract for Frontier to provide redundancy.").) Staff made clear that, given the uncertainty about who bears responsibility for ensuring redundancy and diversity and the costs of the improvements, the timeline of the Commission's proposed remedy plan was untenable. (*Id*. at 144:15-16 ("Two weeks is not enough to do the investigation[.]").)

On July 27, 2022, notwithstanding the constitutional problems that several Commissioners had recognized at the June and July Open Meetings, and the views expressed by the Commission's professional Staff, the Commission issued the Order by a vote of 4-1, adopting the amendments that had been proposed for the first time at the July Open Meeting.

F. The Substance of the Commission's Amendments to the Remedy Plan and Conversion of the Remedy Plan to a Remedy Order.

The Commission's amendments effected several drastic—and onerous—changes to the Remedy Plan. Among the most problematic were the following: First, instead of requiring Frontier to identify areas that lack redundancy or diversity, as the Remedy Plan had done, a new Section IX ordered Frontier to "make all capital improvements" necessary to accomplish redundancy, and to do so irrespective of whether state or federal funds or any other external source of funding would be available. In the words of the new Section IX:

> If Frontier is unable to obtain the state or federal funding outlined in Section III within 180 days from the effective date of the Commission's Order, ***Frontier***

> ***shall entirely fund (such as from internally generated funds, an equity infusion, issuing debt, or some combination thereof) all capital improvements*** contained in the Capital Improvement Plan and other upgrades necessary to achieve the required redundancy. (Order § IX (emphasis added).)

In practical reality, state and federal funding would not be available within the allotted 180 days given that the timelines of applicable government programs are far longer, in certain cases (such as the federal BEAD program) by more than a year. As for recovery from ratepayers, the amendments made clear that Frontier's obligation to "entirely fund" these capital improvements would apply irrespective of whether the costs might be recoverable from ratepayers, vaguely alluding to costs that might be recovered "if Frontier were to seek recovery of such costs from customers in a rate case." (Order § VIII.) Indeed, Chairwoman Márquez Peterson's second revised Amendment No. 2 expressly stated that "if the Company wants to recover costs from customers, ***it must make the necessary improvements*** and file a full rate case." (Second Revised Amendment No. 2 at 1 (emphasis added).) More to the point, the amount of the compelled investment—estimated by Frontier to be as much as $40 million for the area serviced by Frontier White Mountains alone—would result (according to the Commission's own Staff) in a surcharge of $78 per month. (7/13/22 Tr. at 138:13-18.) That surcharge alone is more than ***three times*** the average Frontier White Mountains customer pays for his or her monthly telephone service, resulting in an overall ***quadrupling*** of customers' tab (approximately $100 instead of $25). Such a dramatic escalation in the costs of Frontier's telephone service would sound the death knell for such service in the region serviced by Frontier White Mountains, and likely across the entire state.

Second, Section VIII appears calculated to deny Frontier the rate increase that it would be entitled to receive (even if that rate increase could effectively be passed on to Frontier's customers). Section VIII requires Frontier to explain, if Frontier were to seek recovery of its costs in a rate case, why "the Commission should not allocate more of the Company's cost-of-service allocations to non-Commission jurisdictional customers and/or non-Commission jurisdictional services." (Order § VIII(7).) Allocating costs associated with the Order's compulsory capital investments to "non-Commission jurisdictional customers" is just another way of saying that Frontier will be left with the tab. These other customers have not, and of course will not, agree to pay for costs ordered by the Commission, which has no regulatory authority over them. The only ratepayers who could even theoretically be ordered to defray the costs of the investments are those intrastate telephone service

customers within the Commission's regulatory ambit. By allocating the costs to other interstate and unregulated services, the Commission is effectively requiring Frontier to pay those costs itself.

In dissent, Commissioner Olson amplified certain of the concerns that he and others had expressed at the July Open Meeting, observing that "the remedy plan as amended by the majority could make landline services cost prohibitive such that no one would be willing to subscribe to it any longer." Commissioner Olson further objected that the Order's capital improvements mandate was undertaken "even though we do not yet know what impact this might have on rates." Instead of imposing the mandate first and only later determining whether ratepayers would or could support it, the dissent argued that the Commission's process should have been reversed—determining the rate impact "[b]efore putting in place a mandate that could substantially drive up rates for customers."

III. ARGUMENT

In addition to its practical infirmities, the Order is legally deficient and should be set aside for two independent reasons. First, the Order was issued without affording Frontier due process or abiding by governing administrative procedure under Arizona law. Second, even if the Commission had followed proper procedure, the Order is unlawful, unreasonable, and unsupported by substantial evidence. The Commission should immediately vacate the Order.

A. The Order Was Issued Without Affording Frontier Due Process of Law or Abiding by Governing Administrative Procedural Requirements.

1. The Commission Gave Frontier No Notice of, or Meaningful Opportunity to Be Heard Regarding, the Amendments to the Remedy Plan.

Both the U.S. and Arizona Constitutions provide that "[n]o person shall be deprived of . . . property without due process of law." U.S. Const. amend. V; Ariz. Const. art. II, § 4. Procedural due process requires (i) timely and adequate notice, (ii) "the opportunity to be heard . . . at a meaningful time and in a meaningful manner," (iii) an "effective opportunity to defend by confronting any adverse witnesses and by presenting [one's] own arguments and evidence orally," (iv) the right to personally appear before the official making the final determination, and (v) an impartial decisionmaker who relies "solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 267–70 (1970). When assessing the adequacy of an administrative proceeding, courts must consider the private interest at stake, the trade-offs between the risk of deprivation of such interest and additional

safeguards, along with the government's interests. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Public utilities brought into contest with the state in quasi-judicial rate-setting proceedings are entitled to be fairly advised of what the government proposes and to be heard by the government before it issues its final command. *See, e.g*, *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am*., 315 U.S. 575, 586 (1942); *S. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 347-48 (1965) ("Other courts have held that if a commission is exercising a judicial or quasijudicial function due process of law requires that there be a hearing before a decision. [T]he Commission [is not authorized] to enter an order without a hearing at which a party may introduce evidence and have a decision according to law.") (internal citations omitted); *Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm'n of Texas*, 406 S.W.3d 253, 268 (Tex. App. 2013) (procedural due process violated where Texas public utility commission "did not provide any statutory, rule-based, or precedential support or analysis to support [a] finding in its order").

In addition to constitutional due process, Frontier was also entitled to procedural protections that arise under Arizona statutes. The terms of the proposed amendments to the Remedy Plan—especially the enforceable mandate that Frontier utilize its own assets to "entirely fund" extensive capital improvements to its network before any determination of what the costs would be and whether they would be recoverable—effectively converted the proceeding to a "contested case" under A.R.S. § 41-1001(6), triggering certain procedural requirements under Arizona law, such as a hearing on 20 days' notice, a short and plain statement of the matters asserted, the right to respond and present evidence, and the construction of a fulsome and reliable evidentiary record. *See* A.R.S. § 41-1061 *et seq*.[5]

Title 40 of the Arizona Revised Statutes likewise provides procedural protections. Although Title 40 affords the Commission authority to investigate and hold hearings involving public service corporations such as Frontier, *see* A.R.S. § 40-241 *et. seq.* (Chapter 2, Article 3), the Commission cannot dispense with due process in doing so. Rather, Article 3 requires the issuance of a complaint, a hearing, and ten days' notice before such hearing. A.R.S. § 40-246. And at any such hearing the party

[5] Pursuant to A.R.S. § 41-1067, the provisions of A.R.S. 41-1061 to -1067 (Title 41, Chapter 6 (Adjudicative Procedures), which are part of the Arizona Administrative Procedure statutes) apply to all agencies exempted from Title 41, Chapter 6, Article 10 (Uniform Administrative Hearing Procedures) as provided in A.R.S. § 41-1092.02. The Arizona Corporation Commission is listed in the exemptions and therefore subject to A.R.S. 41-1061 to -1067.

complained of (here, Frontier) has the right to be heard in person or through an attorney and to introduce evidence at the hearing. A.R.S. § 40- 247.

The "proceedings" that led to the issuance of the Order did not remotely satisfy any of these requirements, and thus violated Frontier's constitutional and statutory due process rights. As an initial matter, the July Open Meeting was not an evidentiary hearing. No evidence was introduced, whether in the form of competent documentary evidence or sworn testimony. While Chief Spivey and others were permitted to make oral statements against Frontier, Frontier was given no formal opportunity to respond to them or to offer alternative evidence that might counter the statements that were made. *See, e.g.*, *S. Pac.*, 98 Ariz. at 347 (party "was entitled to introduce evidence at a hearing to establish that its service was reasonable and adequate and to have an impartial [determination] on the evidence"). No objections or offers of proof were permitted, and no proposed findings or exceptions were authorized, except to the extent that Chief Spivey was encouraged to propose certain amendments to the Remedy Plan (again without notice), which the Commission then adopted virtually wholesale. In sum, the Commission's process was unfair, one-sided, and contrary to Arizona law, depriving Frontier of its right "to respond and present evidence and argument on all issues involved." A.R.S. § 41-1061(D). Thus, it was impossible for the Commission to make findings of fact "based exclusively on the evidence and on matters officially noticed." A.R.S. § 41-1061(H).

In all events, Frontier was given no notice, much less the statutorily required 20 days' notice, of the "time, place and nature" of the hearing, the "particular sections of the statutes and rules involved," or a "short and plain statement of the matters asserted." A.R.S. § 41-1061(B). Thus, Frontier was deprived of its inability to even ***prepare*** to contest the charges and accusations lodged against it. Frontier was ambushed.

Indeed, the conduct of the July Open Meeting did not even comport with Arizona's open meeting laws. Those laws demand that an open meeting agenda "list the specific matters to be discussed, considered or decided at the meeting." A.R.S. § 38-431.02(H). While Staff's proposed Remedy Plan had been docketed the day before the July Open Meeting, no notice was given that the Commission contemplated a wholesale and punitive revision of the Remedy Plan until hours after the July Open Meeting commenced. Thus, the Commission's agenda did not provide "such information

as is reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. § 38-431.09(A); *see also E. Valley Inst. of Tech. v. Mahoney*, 2018 WL 1004279, at *3 (Ariz. Ct. App. Feb. 22, 2018).

The flaws in the Commission's process are not curable without affording Frontier the process that is due. As Arizona courts have recognized, the Commission lacks jurisdiction to enter an order when it has failed to follow necessary procedural requirements in a contested case; the jurisdictional defect renders the Commission's order void rather than voidable. *See, e.g.*, *Johnson Utilities, L.L.C. v. Ariz. Corp. Comm'n*., 249 Ariz. 215, 228 (2020) ("[B]efore the Commission may issue an order appointing an interim manager, it must provide a [public service corporation] with basic due process protections, including notice, a hearing, and the opportunity to present evidence and cross-examine witnesses."); *S. Pac.*, 98 Ariz. at 348 ("The Commission's decision of June 3, 1964, attempts to apply petitioner's property to public use without a showing that it was necessary because the service had become inadequate. It suffers from the defect that it unconstitutionally deprives petitioner of its property without due process of law. It is a nullity."); *Gibbons v. Ariz. Corp. Comm'n,* 95 Ariz. 343, 347 (1964) (finding Commission order void for failure to provide "adequate notice of proceedings to persons whose interests are affected thereby" and "full opportunity to be heard"); *Arizona Corp. Comm'n v. Pac. Motor Trucking Co.,* 97 Ariz. 157, 160 (1964) (Commission exceeded its jurisdiction by terminating common carrier's certificate of convenience in contravention of Arizona procedural law); *Application of Trico Elec. Coop. Inc.,* 92 Ariz. 373, 380 (1962) (Commission exceeded its jurisdiction by expanding Tucson Electric's service area in absence of a hearing). Accordingly, the Order is void and should be vacated.

2. The Commission Failed to Identify Any Applicable Legal Obligations or Violations Thereof.

Due process likewise requires that a regulated entity be put on notice of its regulatory obligations and, when subjected to coercive and enforceable remedial action, apprised of the alleged manner in which those obligations were violated. *See Elia v. Arizona State Bd. of Dental Examiners*, 168 Ariz. 221, 228 (Ct. App. 1990) ("Due process assures an individual notice of the charges prior to commencement of a hearing so that the person charged has a meaningful opportunity for explanation and defense."). The Order is deficient in both respects.

The Order does not identify any specific legal obligations owed by Frontier, much less identify any violations of them. Other than invoking the Commission's enforcement powers, the only law referenced in the Order is A.R.S. § 40-321(A). But that statute merely constitutes a general legislative delegation of authority to the Commission to regulate public service corporations; it does not purport to impose any particular regulatory obligation on such corporations. Invocation of that general authority—which Frontier of course does not contest—does not put Frontier on notice of any regulatory obligations it allegedly violated. *See Sulger v. Ariz. Corp. Comm'n,* 5 Ariz. App. 69, 73-74 (1967) (Commission violated due process by failing to set forth specific violations in final order revoking licensee's certificate of convenience and necessity).

The Order appears to assume that Frontier is required, as regulatory matter, to ensure "redundancy" and "diversity" across their network, without any clear explanation of what that entails. This would be an entirely new requirement for carriers operating in Arizona. The potential cost of implementing an ill-defined redundancy and diversity standard is prohibitively expensive for Frontier and would raise similar issues for many if not all other carriers in the state if applied in an evenhanded manner. Given the scope and expense associated with imposing any such obligation, it should have been promulgated through a notice-and-comment rulemaking process, and applied on a neutral basis across the industry, rather than through a pseudo-enforcement proceeding focused on an individual market participant. *See California Trout v. F.E.R.C.*, 572 F.3d 1003, 1022 (9th Cir. 2009) ("We generally expect agencies to deal consistently with the parties or persons coming before them."); *Henry v. I.N.S.*, 74 F.3d 1, 6 (1st Cir. 1996) ("An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.").

Although the Order purports to define the concepts of redundancy and diversity, the "definitions" that are offered raise many more questions than they answer. The Order's "Findings of Fact" section states: "Network route redundancy means a network has more than one means of connecting between two points." (Order, Findings of Fact, ¶ 5.) It then further states: "Network route diversity refers to a routing configuration that includes an additional connection going from Point A and terminating to Point B in such a manner that neither location is constrained by a single access

point." (*Id.*) Both definitions are exceedingly vague and leave essential matters unclear, such as what kind of back-up systems would be required and in which locations (in the case of redundancy), and what kind of routing configuration would be required by the Order's abstract "Point A to Point B" construct (in the case of diversity). The existence of such fundamental questions only underscores that, to the extent the Commission wishes to impose redundancy and diversity requirements, it should do so pursuant to a reasoned rulemaking process applicable to the entire industry in which key technical and feasibility considerations are adequately addressed. As it stands, Frontier is left guessing how to ensure its compliance with these exceedingly vague standards—yet another due process problem. *See State v. McMahon*, 201 Ariz. 548, 551 (Ct. App. 2002) (due process requires that "'the language of a statute convey a definite warning of the proscribed conduct'") (quoting *Fuenning v. Superior Court*, 139 Ariz. 590, 598 (1983)).

B. The Order Is Unlawful, Unreasonable, and Unsupported by Substantial Evidence.

1. The Order Is Unsupported by Any Evidence, Much Less "Substantial Evidence."

To pass constitutional muster, a final order issued by a rate-setting body must be "supported by substantial evidence." *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 792, 808 (1968) (upholding agency order only after concluding that "each of the order's essential elements is supported by substantial evidence"); *see also Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181–82 (D.C. Cir. 1987) ("When the Commission conducts the requisite balancing of consumer and investor interests, based upon factual findings, that balancing will be judicially reviewable and will be affirmed if supported by substantial evidence."); *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 496 P.3d 421, 425 (Ariz. 2021) (courts may disturb a Commission decision based on findings of fact that are arbitrary, unlawful, or unsupported by substantial evidence).

Here, the Order is devoid of any such support. As noted above, the Commission did not even try to create an evidentiary record at the July Open Meeting, much less one that would satisfy the requirements of A.R.S. § 41-1061 (governing contested cases) or §§ 40-246 and 40-247 (governing hearings relating to public service corporations). Frontier's inability to present evidence was especially

egregious given that Frontier operates in an extremely specialized field requiring the input of qualified experts, not impassioned laypeople (such as Chief Spivey and the other public officials who spoke).

The lack of an evidentiary record led directly to a substantively flawed Order—one in which the Commission adopted amendments based on a mistaken view of the facts. The Commission approached the June and July Open Meetings, after listening to Chief Spivey, St. Johns Mayor Udall, and Assistant Fire Chief Kirk, with the assumption that Frontier had somehow done something wrong in connection with the June 11 vandalism or the restoration efforts that followed it. But the Commission's own professional Staff repeatedly and emphatically said otherwise. (7/12/22 Tr. at 44:22-24 ("The company, based on that incident, did not do anything wrong. Absent somebody shooting at their fiber – I don't know – they would not be here"); *id.* at 46:17-22 ("I don't know if you have some other questions for me based on the technical [sic] and the fact that the burden of proof [for an OSC] will be on Staff to show that Frontier did something wrong. And today sitting here, Madam Chair, Commissioner, it's very challenging and difficult for me to prove that."); *id.* at 82:13-16 ("I hope the Commission will not direct us to do an [interim manager] because it becomes – an interim [sic], I would have to show that [Frontier] did something wrong.").) The Commission also seemed to believe that Frontier's customers faced challenges in reaching 911. But in fact, Frontier's customers were unable to connect with 911 for approximately one hour; the larger 911 connection issues were suffered by wireless customers, not Frontier's. Finally, the Commission seemed to assume that Frontier was responsible for maintaining Wireless Carriers' networks, perhaps led astray by the comments of St. Johns Mayor Udall, who incorrectly asserted: "[T]hey didn't meet their obligations to their number-one customer, which is Verizon Wireless." (*Id.* at 23:5-6.) But Frontier's only obligation to the Wireless Carriers is to provide the services set forth in the parties' contract, not to interfere with Wireless Carrier's management decisions about ensuring redundancy that the Wireless Carriers may or may not elect to purchase or otherwise obtain.

The lack of an evidentiary record not only contributed to these mistaken understandings, but also led to significant evidentiary omissions that should have informed the Commission's decision-making. Most critical here, as Commissioner Olson noted in dissent, was the absence of any evidence concerning the recoverability of the Order's compelled investment costs in the rate base. Had Frontier

been afforded an opportunity, with meaningful notice, to offer its own evidence and testimony, the record would have shown that there is no prospect of recovering from ratepayers the estimated $40 million investment in redundancy and diversity. Frontier would have shown the prohibitive costs on a per-customer basis, and that a significant percentage of its existing customers would simply cancel their service and choose a cheaper alternative, rather than acquiesce to the increase.

2. Even if Due Process and Arizona Administrative Procedure Had Been Followed, the Order Is Substantively Unlawful and Unreasonable.

i. The Order's "Forced Investment" Mandate Is an Uncompensated Takings, in Violation of the U.S. and Arizona Constitutions (Section IX).

Both the U.S. and Arizona Constitutions prohibit the state from taking private property without just compensation. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation."); Ariz. Const. art. II. § 17 ("No private property shall be taken or damaged for public or private use without just compensation having first been made[.]"). With respect to rates and orders promulgated by the Commission, the Arizona Constitution specifically provides that the Commission "shall . . . prescribe ***just and reasonable*** rates and charges to be made and collected, by public service corporations within the state for service rendered therein[.]" Ariz. Const. art. XV, § 3 (emphasis added).

As the Commission correctly recognized at the July Open Meeting, the Arizona Constitution thereby ensures that the Commission exercise its regulatory mandate without conscripting public utilities into forced investments with no prospect of earning a return, sticking investors with the bill. (*See, e.g.*, 7/12/2022 Tr. at 103:22-104:3 (Com. Olson: "[T]he company has constitutional private property rights, and if we do not allow recovery and issue a ruling that is confiscatory, then the company can challenge that in the courts, and they will be entitled to obtain both the return of their investment and the return on it. It is their constitutional right."); *id.* at 41:7-12 (Com. Olson: "Like the Chairwoman mentioned, that's not something that's within our constitutional authority to require the company to spend their – their resources without having the entitlement to recover those expenses with the return on – on their investment."); *id.* at 115:4-8 (Com. Olson: "If we mandate that they make these improvements and they don't have funding for it, then they are constitutionally entitled to recover that funding with adjustments in the rate of return."); 7/13/2022 Tr. at 158:12-20 (Com. O'Connor: "[W]e

have to respect, as the constitution demands of us, that . . . you do get the benefit of passing through 100 percent of the cost for what we order you to do, and a profit or return on those costs. We've got to keep [Frontier] in business because if you are not in business then there's not only no redundancy, there's no phone service at all; right?").)

Both the United States Supreme Court and the Arizona Supreme Court have long recognized the force of these constitutional requirements in the context of regulation of public utilities. *See, e.g.*, *Fed. Power Comm'n v. Hope Nat. Gas Co*., 320 U.S. 591, 603 (1944) (recognizing that a public utility's return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."); *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 149 (1956) ("It is elementary that a public utility subject to regulation and fixing of rates is entitled to realize a fair and reasonable profit from its operation in the service of the public.").

Likewise, in *Ameren Services Co. v. FERC,* the D.C. Circuit considered the constitutionality of an agency order that, the petitioners argued, compelled transmission owners to construct, own, and operate certain generator facilities "without compensatory network upgrade charges—thus forcing them to accept additional risk without corresponding return." 880 F.3d 571, 573 (D.C. Cir. 2018). The court remanded the matter to FERC for its failure to adequately respond to petitioners' concerns about "why their current investors should be forced to accept risk-bearing additions to their network with zero return." *Id*. at 582. The court found that the transmission owners had raised "serious statutory and constitutional concerns with respect to the effect of compulsory generator-funded upgrades on their business model." *Id.*; *see also Jersey Cent. Power & Light Co.*, 810 F.2d at 1172.

Similarly, in *Jersey Central Power & Light Co.*, the D.C. Circuit rejected FERC's rate-setting order for failure to grant the utility a hearing and for excluding from its prescribed rate base unamortized portions of a $397 million investment in a nuclear generating station. 810 F.2d at 1171 As the court stated:

> Faced with the claim that the rate order was inconsistent with the Commission's statutory responsibility to provide just and reasonable rates

> and with the constitutional prohibition against uncompensated takings, the Commission briefs advance a legal theory which, if adopted by this court, would immunize virtually all rate orders from this type of challenge. The Commission's theory flies in the face of every Supreme Court decision that addresses this subject, and we are bound to reject it. *Id*. at 1169-70.

Here, the Commission's Order runs afoul of these constitutional protections. In particular, Section IX will force Frontier to expend an estimated $40 million before the Commission has even ***considered***, much less ensured, that the costs will be recoverable from ratepayers. In this respect, the Order is just like the agency decision that was rejected in *Jersey Central*, where the D.C. Circuit held that the petitioner was "entitled to a hearing at which it would have the opportunity to prove its allegations and demonstrate that the end result of the Commission's orders violated statutory and constitutional standards." *Id.* at 1172.

The Order is non-committal on whether the Commission, in exercising rate-making authority, will ***permit*** Frontier to recover the costs of the investment compelled by Section IX. At various points in Section VIII, the Order speaks in equivocal language about the nature and amount of costs Frontier would seek to recover "if Frontier were to seek recovery of such costs from customers in a rate case." (Order, § VIII, ¶ 5; *see also id.* ¶ 5(c), 6, 7.) The Order even threatens that, "if Frontier were to seek recovery of such costs from customers in a rate case," the Commission might "allocate more of the Company's cost-of-service allocations to non-Commission jurisdictional customers and/or non-Commission jurisdictional services"—a questionable exercise of the Commission's authority and a clear indication that, if Frontier were to seek recovery of its compelled investment, it should expect resistance from the Commission in recovering the costs from intrastate services. (*Id*. ¶ 7.)

More concerning, however, is that there is no practical way for Frontier to recover this magnitude of costs through a subsequent rate case. As Commissioner Olson recognized in dissenting from the Order, "the remedy plan as amended by the majority could make landline services cost prohibitive such that no one would be willing to subscribe to it any longer." And even for those consumers who can afford the increased rates, many would be likely to terminate their Frontier service in favor of other more cost-effective alternatives. As a result, there is no real prospect that Frontier could recover $40 million through a subsequent rate case. The Order's mandate that Frontier incur these costs today, and worry about recovery of those costs later, gets things exactly backwards,

threatening the very kind of constitutional injury that caused the D.C. Circuit to remand similar matters to FERC in *Ameren* and *Jersey Central*.

The Commission's apparent intent to allocate some of the costs of the investment to "non-Commission jurisdictional" customers or services provides no solution. (Order § VIII.) The Commission has no jurisdiction or ability to require Frontier to make investments for interstate and other services the Commission does not regulate.[6] Nor does the Commission have authority to shift the cost of its mandated expenditures to companies and consumers over which it has no jurisdiction—*e.g.*, wireless carriers or broadband service providers and their customers. Any "allocation" of costs to customers or services over which the Commission lacks jurisdiction is just another way of ensuring that it is ***Frontier*** who will pay, again resulting in an uncompensated taking.

ii. The Order Singles Out Frontier for Punitive Treatment, in Violation of the Equal Protection Clauses of the U.S. and Arizona Constitutions.

The Order's constitutional infirmities are not limited to the Takings Clause, but also violate equal protection principles. The U.S. Constitution guarantees that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Arizona Constitution contains an identical prohibition. Ariz. Const. art. 2, § 13. Moreover, under the Arizona Constitution, the Commission also has an obligation to issue "reasonable orders." Ariz. Const. art. XV, §3.

The Order's singular focus on Frontier offends these principles. As noted above, Frontier is hardly the only carrier whose network has suffered from occasional service disruptions, with resulting outages in the 911 system. Indeed, the very same issues are the subject of proceedings relating to

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[6] *See also In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, *Declaratory Ruling, Report and Order*, FCC 17-166 (rel. Jan. 4, 2018) at ¶ 18 ("We reinstate the information service classification of broadband Internet access service."), vacated in part on other grounds by *Mozilla Corp. v. FCC*, 940 F.3d 1, 35 (D.C. Cir. 2019) (upholding the FCC's classification of broadband Internet access as an "information service"); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, *Memorandum Opinion and Order*, FCC 04-267 (rel. Nov. 12, 2004) ¶ 1 & n. 78 (confirming that interconnected VoIP is not subject to traditional telephone company regulations); *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007) (affirming Vonage order); *Charter Advanced Services, LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) ("In the absence of direct guidance from the FCC," interconnected VoIP service should be treated as an "information service."); *Geier v. American Honda Motor Co.*, Inc., 529 U.S. 861, 873 (2000) (conflict preemption applies where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that 'obstacle' goes by the name of conflicting; contrary to; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; interference, or the like") (internal citations omitted).

CenturyLink, by far the largest local exchange carrier in Arizona. However, the Commission has treated that company far differently, and has not subjected it to the same redundancy and diversity obligations (and associated compulsory expenditures) that the Order imposes on Frontier. Given the absence of any evidentiary record generated by the proceedings leading to the Order, there is no basis at all, much less a basis supported by substantial evidence, for this differential treatment. This is especially so given Staff's emphatic view, expressed to the Commission, that "what happened on June 11 . . . is not the company's fault," and "the company . . . did not do anything wrong." (7/12/2022 Tr. at 44:19-23.) As a result, treating Frontier differently from CenturyLink regarding the 911 issues is unreasonable and violates Frontier's right to equal protection under the law. *See Waltz Healing Center, Inc. v. Arizona Department of Health Services*, 245 Ariz. 610, 616, 433 P.3d 14, 20 (App. 2018) ("The right of equal protection is a guarantee 'that persons in like circumstances and like conditions be treated equally.'") (quoting *Book-Cellar, Inc. v. City of Phoenix*, 150 Ariz. 42, 45 (App. 1986)); *see also* U.S. Const. amend. XIV, Ariz. Const. art. II, § 13.

iii. The Order's Point of Interconnection Mandate Is Beyond the Commission's Authority and Unlawfully Interferes With Frontier's Management.

Section I instructs Frontier to establish a point of interconnection, or "POI," at a specific point dictated by Comtech. This mandate is unlawful and unreasonable in various respects.

First, there is a pending petition at the FCC regarding the appropriate POIs between local exchange carriers and state 911 providers, and the FCC's ruling will control that issue.[7] As a result, the directive set forth in Section I is preempted by federal law. *See, e.g.*, *Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1112 (9th Cir. 2009) ("The [Telecommunications] Act's language, history, and purpose, in addition to the overwhelming majority of judicial and administrative decisions on the matter, persuade us that state commissions may not impose Section 271 access or pricing requirements in the course of arbitrating interconnection agreements.").

Second, due to the absence of any evidentiary record, there is no reasoned basis for the Commission's conclusion that Comtech's POI is the most appropriate or cost-effective. The failure to

[7] *See* Public Safety and Homeland Security Bureau Seeks Comment on Petition for Rulemaking Filed by the National Association of State 91] Administrators, Public Notice, PS Docket No. 21-479, DA 21-1607 (Dec. 20, 2021), citing Petition for Rulemaking; Alternatively, Petition for Notice of lnquiry et al., CC Docket No. 94-102 et al. (filed Oct. 19, 2021).

conduct any such analysis is particularly troublesome given that, now that Frontier has connected with Comtech's POI in compliance with the order, it will incur approximately $60,000 per month (or $720,000 per year) on an indefinite basis simply to maintain the connection. Here, too, the Order provides no mechanism for Frontier to recover these costs, again leading to an uncompensated taking. At a minimum, Section I's instruction that Frontier spend an undetermined amount, and incur potentially substantial ongoing expenses, without considering less costly alternatives or ensuring recovery of those costs is unreasonable, in violation of the Commission's state constitutional obligation to issue only "reasonable orders." Ariz. Const. art. XV, § 3.

Third, Section I's POI directive amounts to unlawful management interference; the Commission does not have authority to mandate specific network configurations. *See Am. Cable Television, Inc. v. Arizona Pub. Serv. Co.*, 143 Ariz. 273, 276-77 (Ct. App. 1983) (Commission lacked jurisdiction over public utility's agreement licensing surplus telephone space for cable network connections).

Finally, the POI mandate is yet another example of the Order's violation of equal protection principles. As Arizona has managed the transition to Comtech as the state's new 911 administrator, more than 20 local exchange carriers will be required to connect with Comtech. Among these carriers, however, only Frontier has been ordered to connect at the specific POI dictated by Comtech. Other carriers will have the opportunity to negotiate mutually agreeable and potentially less costly resolution of the POI locations with Comtech. There is no reasoned basis for this differential (and punitive) treatment of Frontier. *See Waltz Healing*, 245 Ariz. at 616.

IV. CONCLUSION

For the reasons set forth above, the Order is the product of a fundamentally flawed process, and is facially unlawful, unreasonable, and unsupported by substantial evidence. These procedural and substantive infirmities require its immediate vacatur. Frontier stands ready to work with the Commission and its Staff to develop a viable and fair remedy plan that, in contrast to the Order, will serve Arizona citizens' legitimate expectation of safe and reliable 911 access.

RESPECTFULLY SUBMITTED this 23rd day of September 2022.

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Exhibit A

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

LEA MÁRQUEZ PETERSON – Chair
SANDRA D. KENNEDY
JUSTIN OLSON
ANNA TOVAR
JIM O'CONNOR

INVESTIGATION OF THE FRONTIER COMPANIES ("FRONTIER") IN ARIZONA REGARDING 9-1-1 OUTAGES AND THE ADEQUACY OF FRONTIER EQUIPMENT AND FACILITIES	**DOCKET NOS. T-03214A-21-0198** **T-02115A-21-0198** **T-01954B-21-0198** **T-20680A-21-0198**
	APPLICATION FOR REHEARING OF DECISION NO. 78718 (ORDER AMENDING DECISION NO. 78645)

Citizens Telecommunications Company of the White Mountains, Inc. d/b/a Frontier Communications of the White Mountains, Citizens Utilities Rural Company, Inc., Frontier Communications of the Southwest Inc., and Navajo Communications Company, Inc. (collectively, "Frontier") hereby apply, pursuant to A.R.S. § 40-253 and A.A.C. R14-3-111, for rehearing of Decision No. ~~78645~~**78718**, issued by the Arizona Corporation Commission (the "Commission") on ~~July 27~~**September 20**, 2022 (the "**Amended** Order"). ~~The Order should be set aside for two independent reasons.~~

The Amended Order modifies Decision No. 78645, issued by the Commission on July 27, 2022 (the "Original Order"), by removing a requirement that Frontier disseminate its Emergency Response Plan to public safety agencies and the State 911 Office. The Amended Order provides that "all other aspects" of the Original Order "shall remain in effect." Frontier supports the amendment set forth in the Amended Order, but maintains the objections to the Original Order expressed in Frontier's Application for Rehearing of Decision No. 78645, dated August 16, 2022 (the "August 16 Application"). Accordingly, Frontier hereby

submits this Application for Rehearing of the Amended Order solely to preserve its procedural rights, modifying its August 16 Application only to remove its prior objection to the Emergency Response Plan dissemination requirement, which the Amended Order has resolved. A redline comparison reflecting the changes between the August 16 Application and this Application is attached as Exhibit A hereto.

The Original Order, as modified by the Amended Order (together, the "Order"), should be set aside for two independent reasons.

- First, the Commission issued the Order without affording Frontier due process of law or abiding by governing administrative procedural requirements under Arizona law.
- Second, the Order is unlawful, unreasonable, and unsupported by substantial evidence.

The Order also will have several adverse practical impacts that are not in the public interest. For all of these reasons, Frontier respectfully requests that the Commission vacate the Order in its entirety so that Frontier can work with the Commission and its Utilities Division Staff ("Staff") to develop a remedy plan that will accomplish, rather than undermine, the Commission's legitimate goal of ensuring safe and reliable 911 access for the people of Arizona.

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I. PRELIMINARY STATEMENT

Frontier understands the importance of reliable access to emergency services through 911 for Arizona residents. And Frontier shares the Commission's concerns about the tragic ramifications for the communities of Apache and Navajo counties resulting from the felonious act that was perpetrated against Frontier's network on June 11, 2022. Before that senseless act of vandalism, Frontier had been working closely with Staff to develop and implement an 11-step plan to help protect against future outages (the "Interim Remedy Plan"). The Commission approved the Interim Remedy Plan on March 2, 2022, at which time the Commission acknowledged that Frontier was "making a concerted effort to rectify this situation." (Decision No. 78495 at 16:19.) Since that time, Frontier has filed three compliance filings on this docket in response to the March 2 order detailing the improvements Frontier has been making to its network, along with its efforts to evaluate further measures that can be taken.[1] The only thing that changed between the Commission's approval of the Interim Remedy Plan and its issuance of the Order was that a scofflaw deliberately fired a weapon at Frontier's fiber optic cable in multiple locations—an attack which outraged Frontier as much as it did local residents.

Frontier's efforts to protect against future outages continued following the attack on its network. When an unidentified individual fired a shotgun into Frontier's fiber optic cable, Frontier's landline customers' ability to reach 911 was disrupted for approximately one hour, when Frontier was fixing the cable. Wireless service provided by other carriers such as Verizon ("Wireless Carriers"), who contract with Frontier for Ethernet data services, suffered a longer outage of approximately two days. This failure of the wireless service had a number of tragic consequences that were the subject of the Commission's open meetings in June and July and a town hall held in St. Johns, Arizona. In the meantime, Frontier has continued to collaborate with Staff in implementing the 11-step Interim Remedy Plan, and did not object to the final remedy plan (the "Remedy Plan") that Staff presented for the Commission's approval at the July 12-13 opening meeting. (Dkt. No. E000020073.)

This time, however, instead of endorsing this constructive process, the Commission adopted a series of coercive amendments to the Remedy Plan that—if allowed to stand—will have harmful consequences for Arizona and its residents. Chief among them is that, according to the analysis of

[1] The compliance filings in question can be located on the docket at Nos. E000018573 (Apr. 1, 2022), E000018986 (Apr. 27, 2022), and E000019278 (May 16, 2022).

the Commission's own professional Staff, the Order's compelled investment in "redundancy" and "diversity" likely would result in a surcharge of $78 per month. (7/13/22 Tr. at 138:13-18.)[2] That surcharge alone is more than ***three times*** the average customer's monthly telephone service bill in the affected area.[3] Frontier has no market power to require such increased charges, particularly given the wide array of wireless services and other communications technologies available to consumers in today's market. Frontier's customers would likely drop their service in droves in the face of a ***quadrupling*** of their monthly tab, even if they did not want to do so. As one Commissioner noted at an open meeting, "We've got to keep you guys in business because if you are not in business then there's not only no redundancy, there's no phone service at all." (7/13/22 Tr. at 158:17-20.) If the Order is allowed to stand, either Frontier White Mountains will be driven out of business, or customers will cancel their service. Either way, there will be "no phone service at all."

To the extent the Order requires Frontier to pursue state or federal funding to finance the project, that protection is illusory because the Order requires Frontier to self-fund the investment within 180 days of the Order (*i.e.*, in December 2022), whereas the governmental funding programs referenced in the Order are on fundamentally different timetables. Awards for the NTIA's Enabling Middle Mile Broadband Infrastructure Program will not be identified until March 2023—two months after the Order's deadline for Frontier to begin self-funding. Awards for the NTIA Broadband Equity, Access, and Deployment Program are expected to be announced beginning in the fourth quarter of 2023—some as much as a year or more after the self-funding deadline. Because the self-funding would need to commence before such grants are announced, the Order could preclude the use of such grant money, resulting in higher costs for consumers. Other features of the Order are also ill-advised, such as:

- *Mandating a specific point of interconnection chosen by Comtech, Arizona's new 911 service provider (Section I).* This mandate prematurely rules out the possibility of

[2] Frontier has ordered transcripts of the archived videos of the open meetings referenced in this Application from a certified court reporter and will arrange for the transcripts to be filed in this docket.

[3] For example, for Frontier White Mountains' customers, the basic residential standalone service charge is $25.10, before taxes and other charges, and is comprised of: Single Party Residence Service charge ($15.60), Primary Federal Subscriber Line Charge ($6.50), Access Recovery Charge ($2.50), and Touch Call Service fee ($0.50).

lower costs solutions, requiring Frontier (and potentially other carriers) to incur significant monthly costs indefinitely, which likely will result in higher costs for consumers.

- ~~*Ordering disclosure of Frontier's emergency response plan to various agencies (Section II).* This directive potentially exposes sensitive critical infrastructure information to entities outside the Commission's jurisdiction, many of which likely lack consistent and robust practices for maintaining confidential information, thereby raising security risks.~~

- *Requiring premature budgetary and customer impact analyses (Section VIII).* This requirement goes into effect within 90 days, when uncertainty will remain concerning several key factors, including the award of grant money and cooperation from other carriers, likely resulting in a materially inaccurate and unhelpful submission.

In any event, setting aside these key practical concerns, the Order is unlawful and should be vacated on both procedural and substantive grounds. To summarize:

Procedural Flaws. The Order was issued without affording Frontier due process of law or abiding by the administrative procedural requirements governing the Commission under Arizona statutes. The Commission provided Frontier with no notice or meaningful opportunity to be heard, whether in the form of testimony or other evidence, objections to the proposed amendments with advance notice of their substance, exceptions to proposed findings of fact, or other features of a contested case under Arizona law. Instead, the Commission simply adopted at an open meeting a series of amendments to Staff's proposed Remedy Plan. The Commission did not hold an evidentiary hearing or otherwise generate any semblance of an evidentiary record, relying on the unsworn statements of local officials and third-hand stories of disgruntled customers (most if not all of whom appear to have been wireless customers, not Frontier customers). The Order that resulted from this flawed process failed to identify any applicable legal obligations or violations thereof, whether in respect of maintenance of a 911 system or the redundancy and diversity mandates reflected in the Order.

Substantive Flaws. The Order on its face is unlawful, unreasonable, and unsupported by ***any*** competent evidence, much less the "substantial evidence" required by Arizona law. *See, e.g., Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 496 P.3d 421, 425 (Ariz. 2021). Among other things, the Order's directive that Frontier undertake capital investments estimated at $40 million in the Frontier White Mountains service area alone, with no assurance of any return on the investment (much less the reasonable rate assured by the Arizona Constitution), is an uncompensated taking, in violation of the U.S. and Arizona Constitutions. It is no solution that the Commission intends to allocate costs to "non-Commission jurisdictional" customers in a future rate case, as the Commission has no ability to compel those customers to pay additional costs, effectively requiring Frontier to absorb them. This forced, unrecoverable investment is palpably unfair in light of Staff's repeated observation that Frontier "did not do anything wrong" in connection with its response to the shotgun blast. (7/12/22 Tr. at 44:22-23.)

The Commission's decision to single out Frontier (but not other similarly situated telecom providers) with respect to the Order's redundancy/diversity mandate is likewise unconstitutional, a plain contravention of equal protection principles. And the Order suffers from additional flaws—colliding with the authority of the Federal Communications Commission ("FCC"), unlawfully interfering with Frontier's management, and imposing various disclosure mandates that exceed the scope of the Commission's authority.

In light of the foregoing, the Commission should grant this Application for rehearing and vacate the Order so that Frontier can work with Staff to develop a remedy plan that addresses the Commission's concerns while also attending to the complicated technical and economic feasibility issues presented. In the absence of such relief, Frontier will be forced to seek *de novo* review in superior court, or a Special Action in the Arizona Supreme Court, likely resulting in the very same remand but with unnecessary delay—a result that disserves the interests of the Commission and the Arizona citizens it seeks to protect. *See* A.R.S. § 12-910(F) (Arizona courts reviewing final Commission decisions "shall decide all questions of law [and] . . . all questions of fact without deference to any previous determination that may have been made . . . by the agency").

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Competitive Landscape of Frontier's Telecom Service in Arizona.

Frontier operates in Arizona in a highly competitive landscape for telecom services. Although Frontier is the incumbent provider of landline phone service in the areas in which it operates, including the northeast region of Arizona where the vandalism against Frontier's network occurred, Frontier faces competition from a variety of alternative communication technologies, most notably wireless services. Contrary to Commissioner O'Connor's description of Frontier as a "monopoly compan[y] . . . where you do get the benefit of passing through 100 percent of the cost for what we order you to do, and a profit or return on those costs" (7/13/22 Tr. at 158:13-17), Frontier does not wield anything close to monopoly power. Wireless access is close to ubiquitous in Arizona, such that Frontier's landline customers can, and often do, simply discontinue Frontier service and opt to rely exclusively on wireless services and other alternatives provided by other carriers. This technological and competitive dynamic has resulted in a continuous decline in Frontier White Mountains' customer base for over a decade, from approximately 40,000 landline customers in 2005 to about 10,000 today—an exceedingly small ratepayer base to finance the kind of investment required by the Order. As discussed below, further decline in this small ratepayer base is certain to continue if the costs of landline service increase.

B. Staff Commences Inquiry Into Frontier Service Disruptions Affecting 911 Service, and Frontier Voluntarily Cooperates.

Over a year ago, in July 2021, Staff commenced an investigation at the direction of the Commission relating to telecom service disruptions that had occurred in areas of Arizona served by Frontier, in some cases resulting in citizens' temporary inability to access 911 services. In coordination with Staff, Frontier conducted a detailed root-cause analysis of recent outages. Generally, the service disruptions giving rise to the inquiry resulted from underlying power outages, raising questions as to whether Frontier and other telecom companies operating in Arizona, such as CenturyLink, had sufficient back-up batteries to support uninterrupted service when the power went out. As detailed in Frontier's compliance reports, Frontier has been fully cooperating with Staff's investigation from the outset and has been working diligently to improve service. Frontier has not only investigated how certain power outages frustrated landline customers' ability to complete 911

calls, but also has developed and taken substantial steps to address these outages and other reliability concerns expressed by Staff, expending significant funds to continue to improve its network reliability.

After Staff's nearly nine-month investigation, on March 2, 2022, the Commission approved Staff's 11-step Interim Remedy Plan. (Decision No. 78495.) The Interim Remedy Plan was the product of Frontier's ongoing cooperation with Staff. In addition to various periodic reporting requirements, the Commission required Frontier to "make its best efforts to, within 30 days, make improvements necessary to prevent excessive future outages." (*Id.* at 20:18-22.) If the improvements had not been made within 30 days, the Commission reserved the right to "commence an Order to Show Cause hearing why they have not been made and to consider appropriate penalties." (*Id.* at 20:24-28.) Thirty days later, on April 1, Frontier filed a report updating the Commission on its progress, and then filed supplemental updates on April 27 and again on May 16. Staff never determined that Frontier had failed to meet its obligations under the March 2022 Order, and thus the Commission never commenced an Order to Show Cause hearing. Indeed, the Commission noted that Frontier was "making a concerted effort to rectify this situation; albeit its efforts are in the early stages." (*Id.* at 16:19-20.)

C. Shotgun Attack Damages Frontier White Mountains' Network, Disrupting Wireless Services and Impeding 911 Access.

On June 11, 2022, an unknown individual vandalized Frontier White Mountains' network in a sparsely populated area. The criminal used a shotgun to damage a fiber optic cable in multiple locations spanning a three-mile area. The vandalism did not harm the fiber strands responsible for landline service, leaving such service largely unaffected for Frontier's customers. However, in order to engage in the splicing work necessary to repair the fiber strands that were damaged, Frontier was required to take the landline strands offline for a short interlude. In advance of doing so, Frontier coordinated matters with the four public safety answering points that would be affected, proactively re-routed any calls that would be placed to 911, and successfully tested the re-routing. Certain technical glitches briefly impeded that re-routing, preventing Frontier's landline customers from completing 911 calls for approximately one hour.

In contrast, fibers used for providing data services to Verizon (the main Wireless Carrier in the area) were significantly damaged, preventing residents from placing calls using their cell phones, including to 911, for a period of approximately two days. The services provided by Wireless Carriers are distinct from the regulated telephone services provided by Frontier. Wireless Carriers purchase data services from Frontier in order to provide wireless services to their customers. Those data services are not regulated by the Commission. In contracting with Frontier, Wireless Carriers have a choice as to whether to contract and pay for specific redundant routes, whether by leasing redundant circuits from Frontier, or by contracting for redundant routes with other providers. Wireless Carriers also have the option to build their own facilities to serve and provide redundant and diverse routes to serve their customers. No Wireless Carrier has contracted with Frontier for redundancy in the impacted area, and Frontier has no visibility into whether any have contracted for additional circuits with third parties or self-provisioned their own redundant network, which they have the option to do. As a mere contractual counterparty, Frontier has no practical ability, much less a regulatory obligation, to compel Wireless Carriers to choose redundancy in negotiating for the use of Frontier's network or otherwise. And even if Frontier had redundancy for the area impacted by the damaged fiber, there is no assurance Wireless Carriers would purchase redundancy from Frontier. The existence of redundant facilities does not automatically provide redundant services.

According to oral and written statements by St. Johns Police Chief Lance Spivey, during the service disruption caused by the attack, an elderly resident of St. Johns needed medical assistance and a caretaker was unable to reach emergency services through 911 for some time. Although an ambulance was eventually located, the resident tragically passed away while being transported to the hospital. During the same time period, a young child in the same region seriously injured herself at home. The child's mother was forced to transport the child to a hospital to seek medical care in lieu of an ambulance due to the apparent unavailability of 911. Chief Spivey recounted two other stories involving a teenager with a broken leg and a child with rheumatic fever, but both had successful outcomes. Chief Spivey did not identify any of these individuals as Frontier customers (whose services were impacted for only one hour), as opposed to wireless customers (whose services were more significantly impacted). Frontier grieves for these families' losses and experiences, and has

offered a $10,000 reward for information leading to the apprehension of the person(s) responsible. However, more than two months after the attack on Frontier's network facilities, local law enforcement has yet to identify and apprehend the perpetrator.

D. The Commission Addresses the June 11 Attack and Resulting Service Disruption at the June 28, 2022 Open Meeting.

In the wake of the service disruption and associated 911 issues, and the media coverage that ensued, the Commission discussed the matter at the June 28, 2022 open meeting (the "June Open Meeting"). Chairwoman Márquez Peterson opened the meeting by referring to "the 9-1-1 service failure by Frontier," before any commentary was introduced on what had occurred or whose services had been affected by the attack. (6/28/22 Tr. at 4:7.) Certain local officials from St. Johns—Chief Spivey, Mayor Spence Udall, and Assistant Fire Chief Jason Kirk—recounted stories they had heard of 911 disruption following the June 11 attack, but the Commission did not attempt to determine whether the service disruption the individuals experienced was in connection with services these end users purchased from Frontier or from Wireless Carriers. Indeed, the comments from Messrs. Spivey, Udall, and Kirk each proceeded from the erroneous premise that Frontier was responsible for keeping Verizon's wireless network fully functioning. (*See* 6/28/22 Tr. at 97:20-24 (Chief Spivey: "You heard them talk that Verizon, we're not – they provide the data that provides the feed to the tower. So if they go down, it affects Verizon. And 95 percent of the people in St. Johns probably use Verizon cell phones."); *id.* at 54:2-10 (Mr. Kirk: "[T]here is some truth in Frontier's statement that the 9-1-1 system was only down for approximately 90 minutes on Sunday. The unfortunate part of that is that the play on words that's not addressed is the fact that the backbone of every Verizon cell tower, most of the infrastructure, including gas pumps, as Chief Spivey said, grocery stores and other facilities was rendered useless because of the unavailability of the fiber connection.").) Although representatives of Frontier attended the meeting, answered the Commissioners' questions, and attempted to respond to the stories recounted by local officials, the open meeting was not, and did not purport to be, an evidentiary hearing. No testimony was taken under oath, and no evidentiary record was created.

At the close of the June Open Meeting, the Commission directed Staff to prepare a remedy plan to address certain concerns identified by the Commission relating to service disruption issues.

The Commission did not direct Staff to prepare a complaint and Order to Show Cause, which would have required the Commission to bear the burden of proof on the matters at issue and to give Frontier 20 days' notice. The Remedy Plan was docketed on July 11, 2022. One day later, a proposed order incorporating the Remedy Plan was filed.

The Commission also directed Staff to conduct a town hall session in St. Johns. The Commission required Frontier to send senior executives to the town hall. Staff convened the town hall on July 7, 2022. Four Frontier representatives, three Commissioners, members of Commission Staff, and various members of the public attended. Although the Commissioners in attendance heard public comment, the July 7 town hall was not, and did not purport to be, an evidentiary hearing. No testimony was taken under oath, and no evidentiary record was created. According to Commissioner Tovar, the "vast majority" of the community members who spoke at the town hall were wireless customers. (7/12/22 Tr. at 61:15-17.) The Frontier representatives in attendance were not allowed to respond to community questions during the town hall nor to ask clarifying questions regarding the concerns expressed. However, the Frontier representatives remained after the town hall ended and voluntarily answered questions from the community.

E. The Commission Adopts Certain Amendments to the Remedy Plan, With No Notice to Frontier, at the July 12-13, 2022 Open Meeting.

On July 12 and 13, 2022, the Commission held another open meeting (the "July Open Meeting"). The agenda included the investigation into Frontier's service disruption issues. When the meeting commenced at 9:00 a.m., the only document before the Commission relating to these matters was Staff's Remedy Plan and proposed order that had been solicited by the Commission at the June Open Meeting.

On the first day of the open meeting (at 1:28 p.m., well after the open meeting had commenced), without advance notice to Frontier, Chairwoman Márquez Peterson docketed an amendment to the Remedy Plan to convert it into a "Remedy Order" ("Amendment 1"). Subsequent to Amendment 1, on July 12 and 13, Chairwoman Márquez Peterson and Commissioner Kennedy docketed other proposed amendments to the Staff's Remedy Plan.

Chairwoman Márquez Peterson's second proposed amendment was expressly intended (as noted on the amendment) to adopt substantial portions of amendments proposed by Chief Spivey in a

letter docketed on the morning of July 12 ("Amendment 2"). Amendment 2 was not based on any semblance of an evidentiary record; rather, as the amendment expressly stated, it was intended to simply adopt the recommendations set forth in Chief Spivey's public comment letter. Chief Spivey's oral and written comments did not indicate any technical background on his part in telecommunications engineering or networks.[4]

At the core of Chief Spivey's comments was the assertion that Frontier should be required, at its own expense, to ensure redundancy and diversity for all telecommunications customers. As Chief Spivey stated on the first day of the July Open Meeting: "[Frontier] should be required to use their company profits. . . . I don't even see why this is a discussion point right now." (7/12/22 Tr. at 39-40:25-2.) Chairwoman Márquez-Peterson noted in response that "we don't have jurisdiction on shareholder dollars or company money as you've described it." (*Id.* at 40:5-7.) Staff agreed with the Chairwoman's observation. (7/13/22 Tr. at 139:15-20 ("I know there is numbers thrown out about how they are a multi-billion dollar company. . . . But I believe . . . the jurisdiction for intrastate belongs to the Commission. When it comes to interstate, it belongs to the FCC.").)

In response to Commissioner Kennedy's proposed amendment directing Staff to examine whether an interim manager could or should be appointed at Frontier, Staff noted that the Commission would need to proceed by way of an Order to Show Cause, and that Staff would "have the burden of proof to show that the company did something wrong." (7/12/22 at 44:13-14.) Staff expressed the view that "what happened on June 11 . . . is not the company's fault," and "the company . . . did not do anything wrong." (*Id.* at 44:19-23.) Staff stated further: "I hope the Commission will not direct us to do an [interim manager] because . . . I would have to show that it did something wrong." (*Id.* at 82:13-16.) Staff also noted that, to pursue an interim manager, "you have to go through all this proceeding," and "[i]t's going to take a long time." (*Id.* at 93:22-24.) Nonetheless, Commissioner Kennedy captured the mood on the Commission by brushing aside Staff's due process concerns: "There has to be a remedy ***and we have to do something today***." (*Id.* at 51:1-3 (emphasis added).)

[4] Despite adopting in the Order nearly all of Chief Spivey's suggested amendments, the Commission did not adopt Chief Spivey's recommendation that the Commission issue an Order to Show Cause.

Although the Commission took public comment during the Frontier portion of the agenda, and although Frontier's representatives responded to the Commissioners' questions, Frontier had limited opportunity to comment on the amendments, and in any event had no notice of the amendments or their contents prior to their filing after the July Open Meeting had commenced. The July Open Meeting was not, and did not purport to be, an evidentiary hearing. No testimony was taken under oath, and no evidentiary record was created, regarding Staff's proposed Remedy Plan or the amendments that had been unexpectedly docketed by the Commissioners.

In the course of the July Open Meeting, certain Commissioners noted the constitutional impediments to the kind of confiscatory measures that were under contemplation. For instance, Commissioner Olson stated:

> Certainly understand Chief Spivey's desire to . . . have the company fund it with their property. Like the Chairwoman mentioned, that's not something that's within our constitutional authority to require the company to spend their resources without having the entitlement to recover those expenses with the return on their investment. (*Id.* at 41:6-12.)

Later, Commissioner Olson underscored his concerns:

> My concern is that it's not our prerogative to take their property. . . . [T]he company has constitutional private property rights, and if we do not allow recovery and issue a ruling that is confiscatory, then the company can challenge that in the courts, and they will be entitled to obtain both the return of their investment and the return on it. It is their constitutional right. (*Id.* at 103-04:20-3.)

Commissioner O'Connor agreed: "[W]e have to respect, as the constitution demands of us, that . . . [public utility companies] get the benefit of passing through 100 percent of the cost for what we order you to do, and a profit or return on those costs." (7/13/22 Tr. at 158:12-17.)

As for Staff's views on the costs of ensuring redundancy and diversity, Staff stated: "I don't believe the full [responsibility for] redundancy and diversity belongs to Frontier." (*Id.* at 141:11-14.) Regarding Frontier's leasing of its fiber strands to Wireless Carriers, Staff stated that responsibility for redundancy and diversity is determined by the lease agreement. (*Id.* at 143:17-21 ("I believe Frontier's responsibility is to fulfill the obligation based on the contract, and if Verizon wanted redundancy, they could ask as part of the contract for Frontier to provide redundancy.").) Staff made

clear that, given the uncertainty about who bears responsibility for ensuring redundancy and diversity and the costs of the improvements, the timeline of the Commission's proposed remedy plan was untenable. (*Id.* at 144:15-16 ("Two weeks is not enough to do the investigation[.]").)

On July 27, 2022, notwithstanding the constitutional problems that several Commissioners had recognized at the June and July Open Meetings, and the views expressed by the Commission's professional Staff, the Commission issued the Order by a vote of 4-1, adopting the amendments that had been proposed for the first time at the July Open Meeting.

F. The Substance of the Commission's Amendments to the Remedy Plan and Conversion of the Remedy Plan to a Remedy Order.

The Commission's amendments effected several drastic—and onerous—changes to the Remedy Plan. Among the most problematic were the following: First, instead of requiring Frontier to identify areas that lack redundancy or diversity, as the Remedy Plan had done, a new Section IX ordered Frontier to "make all capital improvements" necessary to accomplish redundancy, and to do so irrespective of whether state or federal funds or any other external source of funding would be available. In the words of the new Section IX:

> If Frontier is unable to obtain the state or federal funding outlined in Section III within 180 days from the effective date of the Commission's Order, ***Frontier shall entirely fund (such as from internally generated funds, an equity infusion, issuing debt, or some combination thereof) all capital improvements*** contained in the Capital Improvement Plan and other upgrades necessary to achieve the required redundancy. (Order § IX (emphasis added).)

In practical reality, state and federal funding would not be available within the allotted 180 days given that the timelines of applicable government programs are far longer, in certain cases (such as the federal BEAD program) by more than a year. As for recovery from ratepayers, the amendments made clear that Frontier's obligation to "entirely fund" these capital improvements would apply irrespective of whether the costs might be recoverable from ratepayers, vaguely alluding to costs that might be recovered "if Frontier were to seek recovery of such costs from customers in a rate case." (Order § VIII.) Indeed, Chairwoman Márquez Peterson's second revised Amendment No. 2 expressly stated that "if the Company wants to recover costs from customers, ***it must make the necessary improvements*** and file a full rate case." (Second Revised Amendment No. 2 at 1 (emphasis added).) More to the point, the amount of the compelled investment—estimated by

Frontier to be as much as $40 million for the area serviced by Frontier White Mountains alone—would result (according to the Commission's own Staff) in a surcharge of $78 per month. (7/13/22 Tr. at 138:13-18.) That surcharge alone is more than ***three times*** the average Frontier White Mountains customer pays for his or her monthly telephone service, resulting in an overall ***quadrupling*** of customers' tab (approximately $100 instead of $25). Such a dramatic escalation in the costs of Frontier's telephone service would sound the death knell for such service in the region serviced by Frontier White Mountains, and likely across the entire state.

Second, Section VIII appears calculated to deny Frontier the rate increase that it would be entitled to receive (even if that rate increase could effectively be passed on to Frontier's customers). Section VIII requires Frontier to explain, if Frontier were to seek recovery of its costs in a rate case, why "the Commission should not allocate more of the Company's cost-of-service allocations to non-Commission jurisdictional customers and/or non-Commission jurisdictional services." (Order § VIII(7).) Allocating costs associated with the Order's compulsory capital investments to "non-Commission jurisdictional customers" is just another way of saying that Frontier will be left with the tab. These other customers have not, and of course will not, agree to pay for costs ordered by the Commission, which has no regulatory authority over them. The only ratepayers who could even theoretically be ordered to defray the costs of the investments are those intrastate telephone service customers within the Commission's regulatory ambit. By allocating the costs to other interstate and unregulated services, the Commission is effectively requiring Frontier to pay those costs itself.

In dissent, Commissioner Olson amplified certain of the concerns that he and others had expressed at the July Open Meeting, observing that "the remedy plan as amended by the majority could make landline services cost prohibitive such that no one would be willing to subscribe to it any longer." Commissioner Olson further objected that the Order's capital improvements mandate was undertaken "even though we do not yet know what impact this might have on rates." Instead of imposing the mandate first and only later determining whether ratepayers would or could support it, the dissent argued that the Commission's process should have been reversed—determining the rate impact "[b]efore putting in place a mandate that could substantially drive up rates for customers."

III. ARGUMENT

In addition to its practical infirmities, the Order is legally deficient and should be set aside for two independent reasons. First, the Order was issued without affording Frontier due process or abiding by governing administrative procedure under Arizona law. Second, even if the Commission had followed proper procedure, the Order is unlawful, unreasonable, and unsupported by substantial evidence. The Commission should immediately vacate the Order.

A. The Order Was Issued Without Affording Frontier Due Process of Law or Abiding by Governing Administrative Procedural Requirements.

1. The Commission Gave Frontier No Notice of, or Meaningful Opportunity to Be Heard Regarding, the Amendments to the Remedy Plan.

Both the U.S. and Arizona Constitutions provide that "[n]o person shall be deprived of . . . property without due process of law." U.S. Const. amend. V; Ariz. Const. art. II, § 4. Procedural due process requires (i) timely and adequate notice, (ii) "the opportunity to be heard . . . at a meaningful time and in a meaningful manner," (iii) an "effective opportunity to defend by confronting any adverse witnesses and by presenting [one's] own arguments and evidence orally," (iv) the right to personally appear before the official making the final determination, and (v) an impartial decisionmaker who relies "solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 267–70 (1970). When assessing the adequacy of an administrative proceeding, courts must consider the private interest at stake, the trade-offs between the risk of deprivation of such interest and additional safeguards, along with the government's interests. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Public utilities brought into contest with the state in quasi-judicial rate-setting proceedings are entitled to be fairly advised of what the government proposes and to be heard by the government before it issues its final command. *See, e.g*, *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575, 586 (1942); *S. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 347-48 (1965) ("Other courts have held that if a commission is exercising a judicial or quasijudicial function due process of law requires that there be a hearing before a decision. [T]he Commission [is not authorized] to enter an order without a hearing at which a party may introduce evidence and have a decision according to law.") (internal citations omitted); *Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm'n of Texas*, 406 S.W.3d 253, 268 (Tex. App. 2013) (procedural

due process violated where Texas public utility commission "did not provide any statutory, rule-based, or precedential support or analysis to support [a] finding in its order").

In addition to constitutional due process, Frontier was also entitled to procedural protections that arise under Arizona statutes. The terms of the proposed amendments to the Remedy Plan—especially the enforceable mandate that Frontier utilize its own assets to "entirely fund" extensive capital improvements to its network before any determination of what the costs would be and whether they would be recoverable—effectively converted the proceeding to a "contested case" under A.R.S. § 41-1001(6), triggering certain procedural requirements under Arizona law, such as a hearing on 20 days' notice, a short and plain statement of the matters asserted, the right to respond and present evidence, and the construction of a fulsome and reliable evidentiary record. *See* A.R.S. § 41-1061 *et seq.*[5]

Title 40 of the Arizona Revised Statutes likewise provides procedural protections. Although Title 40 affords the Commission authority to investigate and hold hearings involving public service corporations such as Frontier, *see* A.R.S. § 40-241 *et. seq.* (Chapter 2, Article 3), the Commission cannot dispense with due process in doing so. Rather, Article 3 requires the issuance of a complaint, a hearing, and ten days' notice before such hearing. A.R.S. § 40-246. And at any such hearing the party complained of (here, Frontier) has the right to be heard in person or through an attorney and to introduce evidence at the hearing. A.R.S. § 40- 247.

The "proceedings" that led to the issuance of the Order did not remotely satisfy any of these requirements, and thus violated Frontier's constitutional and statutory due process rights. As an initial matter, the July Open Meeting was not an evidentiary hearing. No evidence was introduced, whether in the form of competent documentary evidence or sworn testimony. While Chief Spivey and others were permitted to make oral statements against Frontier, Frontier was given no formal opportunity to respond to them or to offer alternative evidence that might counter the statements that were made. *See, e.g., S. Pac.*, 98 Ariz. at 347 (party "was entitled to introduce evidence at a hearing

[5] Pursuant to A.R.S. § 41-1067, the provisions of A.R.S. 41-1061 to -1067 (Title 41, Chapter 6 (Adjudicative Procedures), which are part of the Arizona Administrative Procedure statutes) apply to all agencies exempted from Title 41, Chapter 6, Article 10 (Uniform Administrative Hearing Procedures) as provided in A.R.S. § 41-1092.02. The Arizona Corporation Commission is listed in the exemptions and therefore subject to A.R.S. 41-1061 to -1067.

to establish that its service was reasonable and adequate and to have an impartial [determination] on the evidence"). No objections or offers of proof were permitted, and no proposed findings or exceptions were authorized, except to the extent that Chief Spivey was encouraged to propose certain amendments to the Remedy Plan (again without notice), which the Commission then adopted virtually wholesale. In sum, the Commission's process was unfair, one-sided, and contrary to Arizona law, depriving Frontier of its right "to respond and present evidence and argument on all issues involved." A.R.S. § 41-1061(D). Thus, it was impossible for the Commission to make findings of fact "based exclusively on the evidence and on matters officially noticed." A.R.S. § 41-1061(H).

In all events, Frontier was given no notice, much less the statutorily required 20 days' notice, of the "time, place and nature" of the hearing, the "particular sections of the statutes and rules involved," or a "short and plain statement of the matters asserted." A.R.S. § 41-1061(B). Thus, Frontier was deprived of its inability to even ***prepare*** to contest the charges and accusations lodged against it. Frontier was ambushed.

Indeed, the conduct of the July Open Meeting did not even comport with Arizona's open meeting laws. Those laws demand that an open meeting agenda "list the specific matters to be discussed, considered or decided at the meeting." A.R.S. § 38-431.02(H). While Staff's proposed Remedy Plan had been docketed the day before the July Open Meeting, no notice was given that the Commission contemplated a wholesale and punitive revision of the Remedy Plan until hours after the July Open Meeting commenced. Thus, the Commission's agenda did not provide "such information as is reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. § 38-431.09(A); *see also E. Valley Inst. of Tech. v. Mahoney*, 2018 WL 1004279, at *3 (Ariz. Ct. App. Feb. 22, 2018).

The flaws in the Commission's process are not curable without affording Frontier the process that is due. As Arizona courts have recognized, the Commission lacks jurisdiction to enter an order when it has failed to follow necessary procedural requirements in a contested case; the jurisdictional defect renders the Commission's order void rather than voidable. *See, e.g., Johnson Utilities, L.L.C. v. Ariz. Corp. Comm'n.*, 249 Ariz. 215, 228 (2020) ("[B]efore the Commission may issue an order

appointing an interim manager, it must provide a [public service corporation] with basic due process protections, including notice, a hearing, and the opportunity to present evidence and cross-examine witnesses."); *S. Pac.*, 98 Ariz. at 348 ("The Commission's decision of June 3, 1964, attempts to apply petitioner's property to public use without a showing that it was necessary because the service had become inadequate. It suffers from the defect that it unconstitutionally deprives petitioner of its property without due process of law. It is a nullity."); *Gibbons v. Ariz. Corp. Comm'n*, 95 Ariz. 343, 347 (1964) (finding Commission order void for failure to provide "adequate notice of proceedings to persons whose interests are affected thereby" and "full opportunity to be heard"); *Arizona Corp. Comm'n v. Pac. Motor Trucking Co.*, 97 Ariz. 157, 160 (1964) (Commission exceeded its jurisdiction by terminating common carrier's certificate of convenience in contravention of Arizona procedural law); *Application of Trico Elec. Coop. Inc.*, 92 Ariz. 373, 380 (1962) (Commission exceeded its jurisdiction by expanding Tucson Electric's service area in absence of a hearing). Accordingly, the Order is void and should be vacated.

2. The Commission Failed to Identify Any Applicable Legal Obligations or Violations Thereof.

Due process likewise requires that a regulated entity be put on notice of its regulatory obligations and, when subjected to coercive and enforceable remedial action, apprised of the alleged manner in which those obligations were violated. *See Elia v. Arizona State Bd. of Dental Examiners*, 168 Ariz. 221, 228 (Ct. App. 1990) ("Due process assures an individual notice of the charges prior to commencement of a hearing so that the person charged has a meaningful opportunity for explanation and defense."). The Order is deficient in both respects.

The Order does not identify any specific legal obligations owed by Frontier, much less identify any violations of them. Other than invoking the Commission's enforcement powers, the only law referenced in the Order is A.R.S. § 40-321(A). But that statute merely constitutes a general legislative delegation of authority to the Commission to regulate public service corporations; it does not purport to impose any particular regulatory obligation on such corporations. Invocation of that general authority—which Frontier of course does not contest—does not put Frontier on notice of any regulatory obligations it allegedly violated. *See Sulger v. Ariz. Corp. Comm'n*, 5 Ariz. App. 69,

73-74 (1967) (Commission violated due process by failing to set forth specific violations in final order revoking licensee's certificate of convenience and necessity).

The Order appears to assume that Frontier is required, as regulatory matter, to ensure "redundancy" and "diversity" across their network, without any clear explanation of what that entails. This would be an entirely new requirement for carriers operating in Arizona. The potential cost of implementing an ill-defined redundancy and diversity standard is prohibitively expensive for Frontier and would raise similar issues for many if not all other carriers in the state if applied in an evenhanded manner. Given the scope and expense associated with imposing any such obligation, it should have been promulgated through a notice-and-comment rulemaking process, and applied on a neutral basis across the industry, rather than through a pseudo-enforcement proceeding focused on an individual market participant. *See California Trout v. F.E.R.C.*, 572 F.3d 1003, 1022 (9th Cir. 2009) ("We generally expect agencies to deal consistently with the parties or persons coming before them."); *Henry v. I.N.S.*, 74 F.3d 1, 6 (1st Cir. 1996) ("An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.").

Although the Order purports to define the concepts of redundancy and diversity, the "definitions" that are offered raise many more questions than they answer. The Order's "Findings of Fact" section states: "Network route redundancy means a network has more than one means of connecting between two points." (Order, Findings of Fact, ¶ 5.) It then further states: "Network route diversity refers to a routing configuration that includes an additional connection going from Point A and terminating to Point B in such a manner that neither location is constrained by a single access point." (*Id.*) Both definitions are exceedingly vague and leave essential matters unclear, such as what kind of back-up systems would be required and in which locations (in the case of redundancy), and what kind of routing configuration would be required by the Order's abstract "Point A to Point B" construct (in the case of diversity). The existence of such fundamental questions only underscores that, to the extent the Commission wishes to impose redundancy and diversity requirements, it should do so pursuant to a reasoned rulemaking process applicable to the entire industry in which key technical and feasibility considerations are adequately addressed. As it stands,

Frontier is left guessing how to ensure its compliance with these exceedingly vague standards—yet another due process problem. *See State v. McMahon*, 201 Ariz. 548, 551 (Ct. App. 2002) (due process requires that "'the language of a statute convey a definite warning of the proscribed conduct'") (quoting *Fuenning v. Superior Court*, 139 Ariz. 590, 598 (1983)).

B. The Order Is Unlawful, Unreasonable, and Unsupported by Substantial Evidence.

1. The Order Is Unsupported by Any Evidence, Much Less "Substantial Evidence."

To pass constitutional muster, a final order issued by a rate-setting body must be "supported by substantial evidence." *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 792, 808 (1968) (upholding agency order only after concluding that "each of the order's essential elements is supported by substantial evidence"); *see also Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181–82 (D.C. Cir. 1987) ("When the Commission conducts the requisite balancing of consumer and investor interests, based upon factual findings, that balancing will be judicially reviewable and will be affirmed if supported by substantial evidence."); *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 496 P.3d 421, 425 (Ariz. 2021) (courts may disturb a Commission decision based on findings of fact that are arbitrary, unlawful, or unsupported by substantial evidence).

Here, the Order is devoid of any such support. As noted above, the Commission did not even try to create an evidentiary record at the July Open Meeting, much less one that would satisfy the requirements of A.R.S. § 41-1061 (governing contested cases) or §§ 40-246 and 40-247 (governing hearings relating to public service corporations). Frontier's inability to present evidence was especially egregious given that Frontier operates in an extremely specialized field requiring the input of qualified experts, not impassioned laypeople (such as Chief Spivey and the other public officials who spoke).

The lack of an evidentiary record led directly to a substantively flawed Order—one in which the Commission adopted amendments based on a mistaken view of the facts. The Commission approached the June and July Open Meetings, after listening to Chief Spivey, St. Johns Mayor Udall, and Assistant Fire Chief Kirk, with the assumption that Frontier had somehow done something wrong

in connection with the June 11 vandalism or the restoration efforts that followed it. But the Commission's own professional Staff repeatedly and emphatically said otherwise. (7/12/22 Tr. at 44:22-24 ("The company, based on that incident, did not do anything wrong. Absent somebody shooting at their fiber – I don't know – they would not be here"); *id.* at 46:17-22 ("I don't know if you have some other questions for me based on the technical [sic] and the fact that the burden of proof [for an OSC] will be on Staff to show that Frontier did something wrong. And today sitting here, Madam Chair, Commissioner, it's very challenging and difficult for me to prove that."); *id.* at 82:13-16 ("I hope the Commission will not direct us to do an [interim manager] because it becomes – an interim [sic], I would have to show that [Frontier] did something wrong.").) The Commission also seemed to believe that Frontier's customers faced challenges in reaching 911. But in fact, Frontier's customers were unable to connect with 911 for approximately one hour; the larger 911 connection issues were suffered by wireless customers, not Frontier's. Finally, the Commission seemed to assume that Frontier was responsible for maintaining Wireless Carriers' networks, perhaps led astray by the comments of St. Johns Mayor Udall, who incorrectly asserted: "[T]hey didn't meet their obligations to their number-one customer, which is Verizon Wireless." (*Id.* at 23:5-6.) But Frontier's only obligation to the Wireless Carriers is to provide the services set forth in the parties' contract, not to interfere with Wireless Carrier's management decisions about ensuring redundancy that the Wireless Carriers may or may not elect to purchase or otherwise obtain.

The lack of an evidentiary record not only contributed to these mistaken understandings, but also led to significant evidentiary omissions that should have informed the Commission's decision-making. Most critical here, as Commissioner Olson noted in dissent, was the absence of any evidence concerning the recoverability of the Order's compelled investment costs in the rate base. Had Frontier been afforded an opportunity, with meaningful notice, to offer its own evidence and testimony, the record would have shown that there is no prospect of recovering from ratepayers the estimated $40 million investment in redundancy and diversity. Frontier would have shown the prohibitive costs on a per-customer basis, and that a significant percentage of its existing customers would simply cancel their service and choose a cheaper alternative, rather than acquiesce to the increase.

2. Even if Due Process and Arizona Administrative Procedure Had Been Followed, the Order Is Substantively Unlawful and Unreasonable.

i. The Order's "Forced Investment" Mandate Is an Uncompensated Takings, in Violation of the U.S. and Arizona Constitutions (Section IX).

Both the U.S. and Arizona Constitutions prohibit the state from taking private property without just compensation. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation."); Ariz. Const. art. II. § 17 ("No private property shall be taken or damaged for public or private use without just compensation having first been made[.]"). With respect to rates and orders promulgated by the Commission, the Arizona Constitution specifically provides that the Commission "shall . . . prescribe ***just and reasonable*** rates and charges to be made and collected, by public service corporations within the state for service rendered therein[.]" Ariz. Const. art. XV, § 3 (emphasis added).

As the Commission correctly recognized at the July Open Meeting, the Arizona Constitution thereby ensures that the Commission exercise its regulatory mandate without conscripting public utilities into forced investments with no prospect of earning a return, sticking investors with the bill. (*See, e.g.*, 7/12/2022 Tr. at 103:22-104:3 (Com. Olson: "[T]he company has constitutional private property rights, and if we do not allow recovery and issue a ruling that is confiscatory, then the company can challenge that in the courts, and they will be entitled to obtain both the return of their investment and the return on it. It is their constitutional right."); *id.* at 41:7-12 (Com. Olson: "Like the Chairwoman mentioned, that's not something that's within our constitutional authority to require the company to spend their – their resources without having the entitlement to recover those expenses with the return on – on their investment."); *id.* at 115:4-8 (Com. Olson: "If we mandate that they make these improvements and they don't have funding for it, then they are constitutionally entitled to recover that funding with adjustments in the rate of return."); 7/13/2022 Tr. at 158:12-20 (Com. O'Connor: "[W]e have to respect, as the constitution demands of us, that . . . you do get the benefit of passing through 100 percent of the cost for what we order you to do, and a profit or return on those costs. We've got to keep [Frontier] in business because if you are not in business then there's not only no redundancy, there's no phone service at all; right?").)

Both the United States Supreme Court and the Arizona Supreme Court have long recognized the force of these constitutional requirements in the context of regulation of public utilities. *See, e.g.*, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (recognizing that a public utility's return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."); *Simms v. Round Valley Light & Power Co.*, 80 Ariz. 145, 149 (1956) ("It is elementary that a public utility subject to regulation and fixing of rates is entitled to realize a fair and reasonable profit from its operation in the service of the public.").

Likewise, in *Ameren Services Co. v. FERC,* the D.C. Circuit considered the constitutionality of an agency order that, the petitioners argued, compelled transmission owners to construct, own, and operate certain generator facilities "without compensatory network upgrade charges—thus forcing them to accept additional risk without corresponding return." 880 F.3d 571, 573 (D.C. Cir. 2018). The court remanded the matter to FERC for its failure to adequately respond to petitioners' concerns about "why their current investors should be forced to accept risk-bearing additions to their network with zero return." *Id.* at 582. The court found that the transmission owners had raised "serious statutory and constitutional concerns with respect to the effect of compulsory generator-funded upgrades on their business model." *Id.*; *see also Jersey Cent. Power & Light Co.*, 810 F.2d at 1172.

Similarly, in *Jersey Central Power & Light Co.*, the D.C. Circuit rejected FERC's rate-setting order for failure to grant the utility a hearing and for excluding from its prescribed rate base unamortized portions of a $397 million investment in a nuclear generating station. 810 F.2d at 1171 As the court stated:

> Faced with the claim that the rate order was inconsistent with the Commission's statutory responsibility to provide just and reasonable rates and with the constitutional prohibition against uncompensated takings, the Commission briefs advance a legal theory which, if adopted by this court, would immunize virtually all rate orders from this type of challenge. The Commission's theory flies in the face of every Supreme Court decision that addresses this subject, and we are bound to reject it. *Id.* at 1169-70.

Here, the Commission's Order runs afoul of these constitutional protections. In particular, Section IX will force Frontier to expend an estimated $40 million before the Commission has even ***considered***, much less ensured, that the costs will be recoverable from ratepayers. In this respect, the Order is just like the agency decision that was rejected in *Jersey Central*, where the D.C. Circuit held that the petitioner was "entitled to a hearing at which it would have the opportunity to prove its allegations and demonstrate that the end result of the Commission's orders violated statutory and constitutional standards." *Id.* at 1172.

The Order is non-committal on whether the Commission, in exercising rate-making authority, will ***permit*** Frontier to recover the costs of the investment compelled by Section IX. At various points in Section VIII, the Order speaks in equivocal language about the nature and amount of costs Frontier would seek to recover "if Frontier were to seek recovery of such costs from customers in a rate case." (Order, § VIII, ¶ 5; *see also id.* ¶ 5(c), 6, 7.) The Order even threatens that, "if Frontier were to seek recovery of such costs from customers in a rate case," the Commission might "allocate more of the Company's cost-of-service allocations to non-Commission jurisdictional customers and/or non-Commission jurisdictional services"—a questionable exercise of the Commission's authority and a clear indication that, if Frontier were to seek recovery of its compelled investment, it should expect resistance from the Commission in recovering the costs from intrastate services. (*Id.* ¶ 7.)

More concerning, however, is that there is no practical way for Frontier to recover this magnitude of costs through a subsequent rate case. As Commissioner Olson recognized in dissenting from the Order, "the remedy plan as amended by the majority could make landline services cost prohibitive such that no one would be willing to subscribe to it any longer." And even for those consumers who can afford the increased rates, many would be likely to terminate their Frontier service in favor of other more cost-effective alternatives. As a result, there is no real prospect that Frontier could recover $40 million through a subsequent rate case. The Order's mandate that Frontier incur these costs today, and worry about recovery of those costs later, gets things exactly backwards, threatening the very kind of constitutional injury that caused the D.C. Circuit to remand similar matters to FERC in *Ameren* and *Jersey Central*.

The Commission's apparent intent to allocate some of the costs of the investment to "non-Commission jurisdictional" customers or services provides no solution. (Order § VIII.) The Commission has no jurisdiction or ability to require Frontier to make investments for interstate and other services the Commission does not regulate.[6] Nor does the Commission have authority to shift the cost of its mandated expenditures to companies and consumers over which it has no jurisdiction—*e.g.*, wireless carriers or broadband service providers and their customers. Any "allocation" of costs to customers or services over which the Commission lacks jurisdiction is just another way of ensuring that it is ***Frontier*** who will pay, again resulting in an uncompensated taking.

ii. The Order Singles Out Frontier for Punitive Treatment, in Violation of the Equal Protection Clauses of the U.S. and Arizona Constitutions.

The Order's constitutional infirmities are not limited to the Takings Clause, but also violate equal protection principles. The U.S. Constitution guarantees that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Arizona Constitution contains an identical prohibition. Ariz. Const. art. 2, § 13. Moreover, under the Arizona Constitution, the Commission also has an obligation to issue "reasonable orders." Ariz. Const. art. XV, §3.

The Order's singular focus on Frontier offends these principles. As noted above, Frontier is hardly the only carrier whose network has suffered from occasional service disruptions, with resulting outages in the 911 system. Indeed, the very same issues are the subject of proceedings relating to CenturyLink, by far the largest local exchange carrier in Arizona. However, the Commission has

[6] *See also In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, *Declaratory Ruling, Report and Order*, FCC 17-166 (rel. Jan. 4, 2018) at ¶ 18 ("We reinstate the information service classification of broadband Internet access service."), vacated in part on other grounds by *Mozilla Corp. v. FCC*, 940 F.3d 1, 35 (D.C. Cir. 2019) (upholding the FCC's classification of broadband Internet access as an "information service"); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, *Memorandum Opinion and Order*, FCC 04-267 (rel. Nov. 12, 2004) ¶ 1 & n. 78 (confirming that interconnected VoIP is not subject to traditional telephone company regulations); *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007) (affirming Vonage order); *Charter Advanced Services, LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) ("In the absence of direct guidance from the FCC," interconnected VoIP service should be treated as an "information service."); *Geier v. American Honda Motor Co.*, Inc., 529 U.S. 861, 873 (2000) (conflict preemption applies where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that 'obstacle' goes by the name of conflicting; contrary to; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; interference, or the like") (internal citations omitted).

treated that company far differently, and has not subjected it to the same redundancy and diversity obligations (and associated compulsory expenditures) that the Order imposes on Frontier. Given the absence of any evidentiary record generated by the proceedings leading to the Order, there is no basis at all, much less a basis supported by substantial evidence, for this differential treatment. This is especially so given Staff's emphatic view, expressed to the Commission, that "what happened on June 11 . . . is not the company's fault," and "the company . . . did not do anything wrong." (7/12/2022 Tr. at 44:19-23.) As a result, treating Frontier differently from CenturyLink regarding the 911 issues is unreasonable and violates Frontier's right to equal protection under the law. *See Waltz Healing Center, Inc. v. Arizona Department of Health Services*, 245 Ariz. 610, 616, 433 P.3d 14, 20 (App. 2018) ("The right of equal protection is a guarantee 'that persons in like circumstances and like conditions be treated equally.'") (quoting *Book-Cellar, Inc. v. City of Phoenix*, 150 Ariz. 42, 45 (App. 1986)); *see also* U.S. Const. amend. XIV, Ariz. Const. art. II, § 13.

iii. ~~Certain of the~~The Order's ~~Other Mandates Are~~Point of Interconnection Mandate Is Beyond the Commission's Authority and Unlawfully ~~Interfere~~Interferes With Frontier's Management.

~~The Order contains other mandates that exceed the Commission's authority, unlawfully interfere with Frontier's management and operations, and are otherwise unreasonable. The Order should be vacated for these reasons as well.~~

~~a. Point of Interconnection Mandate (Section I)~~

Section I instructs Frontier to establish a point of interconnection, or "POI," at a specific point dictated by Comtech. This mandate is unlawful and unreasonable in various respects.

First, there is a pending petition at the FCC regarding the appropriate POIs between local exchange carriers and state 911 providers, and the FCC's ruling will control that issue.[7] As a result, the directive set forth in Section I is preempted by federal law. *See, e.g.*, *Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1112 (9th Cir. 2009) ("The [Telecommunications] Act's language, history, and purpose, in addition to the overwhelming majority of judicial and administrative

[7] *See* Public Safety and Homeland Security Bureau Seeks Comment on Petition for Rulemaking Filed by the National Association of State 91] Administrators, Public Notice, PS Docket No. 21-479, DA 21-1607 (Dec. 20, 2021), citing Petition for Rulemaking; Alternatively, Petition for Notice of lnquiry et al., CC Docket No. 94-102 et al. (filed Oct. 19, 2021).

decisions on the matter, persuade us that state commissions may not impose Section 271 access or pricing requirements in the course of arbitrating interconnection agreements.").

Second, due to the absence of any evidentiary record, there is no reasoned basis for the Commission's conclusion that Comtech's POI is the most appropriate or cost-effective. The failure to conduct any such analysis is particularly troublesome given that, now that Frontier has connected with Comtech's POI in compliance with the order, it will incur approximately $60,000 per month (or $720,000 per year) on an indefinite basis simply to maintain the connection. Here, too, the Order provides no mechanism for Frontier to recover these costs, again leading to an uncompensated taking. At a minimum, Section I's instruction that Frontier spend an undetermined amount, and incur potentially substantial ongoing expenses, without considering less costly alternatives or ensuring recovery of those costs is unreasonable, in violation of the Commission's state constitutional obligation to issue only "reasonable orders." Ariz. Const. art. XV, § 3.

Third, Section I's POI directive amounts to unlawful management interference; the Commission does not have authority to mandate specific network configurations. *See Am. Cable Television, Inc. v. Arizona Pub. Serv. Co.*, 143 Ariz. 273, 276-77 (Ct. App. 1983) (Commission lacked jurisdiction over public utility's agreement licensing surplus telephone space for cable network connections).

Finally, the POI mandate is yet another example of the Order's violation of equal protection principles. As Arizona has managed the transition to Comtech as the state's new 911 administrator, more than 20 local exchange carriers will be required to connect with Comtech. Among these carriers, however, only Frontier has been ordered to connect at the specific POI dictated by Comtech. Other carriers will have the opportunity to negotiate mutually agreeable and potentially less costly resolution of the POI locations with Comtech. There is no reasoned basis for this differential (and punitive) treatment of Frontier. *See Waltz Healing*, 245 Ariz. at 616.

~~b. Emergency Response Plan (Section II)~~

~~Section II requires Frontier to file any federal or state Emergency Response Plan with not only the Commission, but also with "all public safety agencies within Frontier's service area and the State 9-1-1 Office" so long as those entities have signed a protective order. As the Order appears to~~

acknowledge, such emergency response plans contain critical infrastructure information that falls within the scope of the federal Cybersecurity Infrastructure Security Act ("CISA"), 6 U.S.C. § 1501, and the Critical Infrastructure Information Act of 2002, 6 U.S.C. § 673. And yet the Order compels an exceedingly broad dissemination; read literally, it would mean sharing such materials with numerous municipal police departments, county sheriff's offices, and tribal police departments. The mandate can also be read to extend to federal public safety agencies with offices in the service areas, volunteer or private fire departments, and private emergency medical service/ambulance providers.

Such dissemination is not permissible under CISA, and the Section II is accordingly unlawful and preempted insofar as compliance would require violation of federal law. *See Qwest Corp. v. Arizona Corp. Comm'n.*, 496 F. Supp. 2d 1069, 1077 (D. Ariz. 2007), *aff'd sub nom. Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109 (9th Cir. 2009) (Commission's arbitration orders enforcing compliance with federal requirements for interconnection between carriers conflicted with Telecommunications Act and were therefore preempted). It is equally unclear whether the Commission has authority to mandate disclosure to state or federal entities whose regulatory responsibility is outside the scope of the Commission's jurisdiction. *See Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 245 (1982) (acknowledging ACC's and FERC's separate jurisdictions); *Am. Cable Television, Inc.*,143 Ariz. at 276-77 (holding that where ACC lacked jurisdiction to regulate pole attachment agreements, it could not regulate the rates, terms and conditions of pole attachment agreements between cable television and public service corporations).

It is no answer that the Order would require recipients other than the Commission to sign a protective order. A protective order cannot ensure that such information will not be disclosed, especially where, as here, the Commission has no authority over the receiving entities. Moreover, when it comes to such highly confidential and sensitive information, a mere protective order is inadequate because information relating to critical infrastructure could still be disclosed. Once improperly disclosed, the harm would be incapable of being remedied, potentially enabling an attack that could dwarf the gunshot blasts that occurred on June 11.

IV. CONCLUSION

For the reasons set forth above, the Order is the product of a fundamentally flawed process, and is facially unlawful, unreasonable, and unsupported by substantial evidence. These procedural and substantive infirmities require its immediate vacatur. Frontier stands ready to work with the Commission and its Staff to develop a viable and fair remedy plan that, in contrast to the Order, will serve Arizona citizens' legitimate expectation of safe and reliable 911 access.

RESPECTFULLY SUBMITTED this ~~16th~~**23rd** day of ~~August~~**September** 2022.

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